EDITOR'S NOTE

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. 85-546-CFX
atus: GRANTED

Title: United States, Petitioner
v.
Florence Blacketter Mottaz, etc.

cketed:
ptember 26, 1985

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Amerman, Derck

| try | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Jul 16 1985 | | Application for extension of time to file petition and order granting same until September 26, 1985 (Blackmun, July 22, 1985). |
| 2 | Sep 26 1985 | G | Petition for writ of certiorari filed. |
| 3 | Oct 25 1985 | | Brief of respondent Florence B. Mottaz in opposition filed. |
| 4 | Oct 30 1985 | | DISTRIBUTED. November 15, 1985 |
| 5 | Nov 12 1985 | X | Reply brief of petitioner United States filed. |
| 6 | Nov 18 1985 | | Petition GRANTED. |
| | | | ********** |
| 8 | Dec 23 1985 | | Order extending time to file brief of petitioner on the merits until January 11, 1986. |
| 9 | Jan 9 1986 | G | Motion of American Land Title Association for leave to file a brief as amicus curiae filed. |
| 0 | Jan 11 1986 | | Brief of petitioner United States filed. |
| 2 | Jan 16 1986 | | Joint appendix filed. |
| 3 | Jan 27 1986 | | Motion of American Land Title Association for leave to file a brief as amicus curiae GRANTED. |
| 4 | Feb 7 1986 | | Record filed. |
| 5 | Feb 7 1986 | | Certified original record and proceedings received. |
| 6 | Feb 11 1986 | | Brief of respondents Florence B. Mottaz, et al. filed. |
| 7 | Feb 10 1986 | | Brief amicus curiae of Navajo Tribe of Indians filed. |
| 8 | Feb 13 1986 | | Brief amicus curiae of Katherine Nichols, et al. filed. |
| 9 | Mar 14 1986 | | SET FOR ARGUMENT, Tuesday, April 22, 1986. (2nd case) |
| 0 | Mar 14 1986 | | CIRCULATED. |
| 1 | Apr 15 1986 | X | Reply brief of petitioner United States filed. |
| 2 | Apr 22 1986 | | ARGUED. |

85-546

No.



# In the Supreme Court of the United States

OCTOBER TERM, 1985

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UNITED STATES OF AMERICA, PETITIONER

*v.*

FLORENCE BLACKETTER MOTTAZ, ET AL.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

CHARLES FRIED
*Acting Solicitor General*
F. HENRY HABICHT II
*Assistant Attorney General*
LOUIS F. CLAIBORNE
*Deputy Solicitor General*
EDWIN S. KNEEDLER
*Assistant to the Solicitor General*
DAVID C. SHILTON
J. CAROL WILLIAMS
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*



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## QUESTION PRESENTED

Whether either the six-year statute of limitations in 28 U.S.C. 2401(a) or the twelve-year statute of limitations under the Quiet Title Act, 28 U.S.C. 2409a(f), bars a suit brought by the heir of an Indian allottee against the United States to recover land (or its value in money damages) to which the United States acquired title 27 years earlier.

## PARTIES TO THE PROCEEDING

The only parties to the proceeding are those listed in the caption. Respondent sought to represent a class of all similarly situated Indians residing in the United States. However, the district court dismissed the suit on statute of limitations grounds, and it therefore did not certify a class.



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# In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 753 F.2d 71, and the memorandum order of the district court (App., *infra*, 9a-11a) is unreported.

## JURISDICTION

The judgment of the court of appeals (App., *infra*, 12a) was entered on January 18, 1985, and a petition for rehearing was denied on April 29, 1985 (App., *infra*, 13a). By order dated July 22, 1985, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including September 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

25 U.S.C. 345 and 483, and 28 U.S.C. 1353, 2401, 2501 and 2409a, are reproduced in relevant part at App., *infra*, 14a-17a.

## STATEMENT

1. On December 5, 1905, three Chippewa Indian ancestors of respondent Mottaz received allotments of land on the Leech Lake Reservation in Cass County, Minnesota, pursuant to the General Allotment Act of February 8, 1887, 25 U.S.C. 331 *et seq.*, and the Nelson Act of January 14, 1889, 25 Stat. 642 *et seq.* The allotments were held in trust by the United States for periods that eventually were extended indefinitely by Section 2 of the Indian Reorganization Act of 1934, 25 U.S.C. 462. Respondent inherited a one-fifth interest in one of the allotments and a one-thirtieth interest in each of the other two (App., *infra*, 2a).

Under 25 U.S.C. 483, the Secretary of the Interior "is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians." In the early 1950s, some of the individuals who also owned fractional interests in the three allotments at issue in this case petitioned the Department of the Interior to sell the allotments. In May 1953, the Office of Indian Affairs of the Department sent letters to respondent pertaining to each of these allotments. App., *infra*, 2a. The letters read in part (*ibid.* (emphasis added)):

> Some of the owners have requested the sale of this land. We have appraised both land and timber, if any, and as soon as we get the consent to sell, an effort will be made to obtain a buyer by advertising



> for sale bids. This land will not be sold unless the high bid is equal to, or more than, the appraisal value. *If no reply is received from you within ten (10) days, it will be assumed that you have no objection to the sale.*

Respondent did not object to the sale of the allotments (*id.* at 9a), although she also did not sign and return to the Office of Indian Affairs a form that expressly consented to the sales (*id.* at 3a). The Interior Department accepted bids for the allotments, and in 1954, each allotment was sold to the United States Forest Service. The normal procedure was then to distribute the proceeds of the sales to the heirs who held an interest in the allotments (*id.* at 9a), and there is no allegation in the complaint in this case that such a distribution did not occur with respect to the three allotments at issue. Those tracts are now included in the Chippewa National Forest (*id.* at 3a).

In 1967, respondent visited the Bureau of Indian Affairs (BIA) and expressed a desire to sell all of her inherited land. In its written response to that visit, BIA identified the interests in allotments that respondent then held. BIA's response did not mention any interest in the three allotments at issue here. DX A.8; see App., *infra*, 3a. In response to another inquiry in 1981, BIA again provided respondent with a list of all her current interests in allotments. BIA also indicated that respondent once had held interests in the three allotments that were sold to the Forest Service in 1954. However, it informed her that those interests had been identified by BIA as so-called "Secretarial Transfer" cases, which referred to transactions in which not all of the heirs had consented to the conveyance of their interests in a particular allotment. C.A. App. 36.[1] BIA had instituted a project in the late 1970s for the identification of such

[1] "C.A. App." refers to the appendix in the court of appeals.

potential claims that might be affected by the statute of limitations in 28 U.S.C. 2415, a provision applicable to trespass damage actions brought by the United States on behalf of Indians. App., *infra*, 3a. See generally *County of Oneida* v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 14-16 ("*Oneida II*").[2]

2. On December 30, 1981, respondent filed this action in the United States District Court for the District of Minnesota (C.A. App. 5). She alleged, inter alia, that the sales of the three allotments were made without her consent or permission and were illegal and void (*id.* at 3); that the United States breached its fiduciary duty when it transferred the land without obtaining her consent (*id.* at 4-5); and that her property was taken for a public use without just compensation, in violation of the Fifth Amendment (C.A.App. 4-5). As relief, respondent sought damages in the amount of the current fair market value of the land or, in the alternative, rescission of the sales, with title to the allotments to revest in the appropriate descendents, heirs, and assigns (*id.* at 5; App., *infra*, 3a-4a). Respondent also sought to represent a class of all Indian allotees and their descendents, heirs and assigns who were affected by similar sales and

[2] 28 U.S.C. 2415, which was originally enacted in 1966 (Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304 *et seq.*), imposes a statute of limitations on actions brought by the United States generally, including those brought on behalf of Indians. Section 2415 originally imposed a six-year limitation on the United States' bringing of contract claims, a three-year limitation on tort claims, and a six-year limitation on trespass actions and certain other actions. Prior to 1982, the statute had been amended on a number of occasions to extend the limitations period for damage actions relating to Indian lands. Act of July 18, 1972, Pub. L. No. 92-353, 86 Stat. 499 *et seq.*; Act of Oct. 13, 1972, Pub. L. No. 92-485, 86 Stat. 803; Act of Aug. 15, 1977, Pub. L. No. 95-103, 91 Stat. 842 *et seq.*; Act of Mar. 27, 1980, Pub. L. No. 96-217, 94 Stat. 126 *et seq.*

In connection with the 1982 amendments to 28 U.S.C. 2415, the Secretary was required to prepare a list of Indian claims that were



transfers of Indian land located anywhere in the United States (C.A. App. 3-4). Following a pretrial hearing on June 6, 1982, respondent dismissed without prejudice her demand for rescission of the sales and revesting of title in respondent and others (C.A. App. 10), leaving only her demand for damages (App., *infra*, 4a).

On October 7, 1983, the district court granted the United States' motion for summary judgment, holding that this suit is barred by the six-year statute of limitations in 28 U.S.C. 2401(a), which provides that "every civil action" commenced against the United States shall be barred unless it is filed within six years after the right of action first accrues. App., *infra.*, 9a-11a. The court held that respondent's cause of action accrued when she learned of the sales, and it found that "[t]he deposition of [respondent] clearly reveals that she had knowledge of the sales in 1954" (App., *infra*, 10a). The court therefore held that this suit is time-barred under 28 U.S.C. 2401(a) (App., *infra*, 10a). The district court also rejected respondent's argument that the statute of limitations in 28 U.S.C. 2415 for trespass damage actions relating to Indian lands overrides the six-year statute of limitations in 28 U.S.C. 2401(a). The court reasoned that "28 U.S.C. § 2415 applies to actions brought *on behalf of* a recognized tribe or individual

subject to the statute of limitations. Those claims that were listed were preserved; those that were not listed were time-barred after 60 days. Indian Claims Limitations Act of 1982, Pub. L. No. 97-394, 96 Stat. 1976 *et seq.*, 28 U.S.C. 2415 note. See *Oneida II*, slip op. 15. The legislative history of the 1982 amendments describes "Secretarial transfer" cases as trespass claims that resulted from the Secretary's sale of trust land in heirship status without the consent of all the heirs. See H.R. Rep. 97-954, 97th Cong., 2d Sess. 7 (1982).

Indian," not "claims *against* the United States," which are governed by 28 U.S.C. 2401(a). App., *infra*, 10a-11a (emphasis in original).

3. The court of appeals reversed and remanded (App., *infra*, 1a-8a). Although respondent had dismissed her complaint insofar as it sought rescission of the sales and the revesting of title in respondent and others, the court of appeals did not read this amendment to abandon the "gist" of her complaint, "which was that the sale of the land was illegal and void and did not transfer title" (*id.* at 4a). Instead, the court believed that "[respondent's] claim for damages in the amount of the fair market value of the land must be construed as equivalent to a claim for return of the land itself" (*id.* at 6a). The court believed "as a matter of policy" that it would be an appropriate remedy to permit respondent to seek compensation rather than a return of the land, because the parcels are incorporated in an inaccessible national forest where they have little value to respondent (*id.* at 6a-7a).

In its brief discussion of the statute of limitations issue (App., *infra*, 4a-6a), the court read this Court's decision in *Ewert* v. *Bluejacket*, 259 U.S. 129 (1922), to stand for the proposition that a sale of Indian land in violation of federal restrictions on alienation does not transfer title and that neither the allottee nor his heirs may be barred by a state statute of limitations from bringing suit to establish that they retain title to the land (App., *infra*, 4a-5a). The court acknowledged that the parties had not identified any case that considered whether *Ewert* v. *Bluejacket* also prevents the application of *federal* statutes of limitations to Indian land claims (App., *infra*, 5a-6a). However, without discussion or citation to supporting authority, the court concluded that "Congress has not repudiated its policy of protecting Indian land by providing that claims against the



United States for title to wrongfully alienated allotments are barred by a statute of limitations" (*id.* at 6a). In the court's view, *Ewert* v. *Bluejacket* stands for the proposition that if the underlying sale of land is void, "the concept that a cause of action 'accrues' at some point [for purposes of a statute of limitation] is inapplicable because the allottee simply retains title all along" (*id.* at 6a).

The court of appeals then remanded the case for further proceedings (App., *infra*, 7a-8a). In doing so, the court held that respondent's failure to interpose an objection to the sale of the allotments in 1953 would not in itself constitute consent to the sale, but it held that if respondent in fact received payment for her interests in the land in 1955, it "may be assumed that she consented to the sale and thus that she does not have a cause of action" (*id.* at 7a).[3] The court acknowledged the government's argument that "the payment records may be difficult if not impossible to recover and that this is a good reason why a statute of limitations should bar [respondent's] claim" (*id.* at 7a n.8). Nevertheless, the court held that "[t]he government must bear the burden of proving that it paid [respondent] and therefore that it holds valid title to the [three] allotments" (*id.* at 7a).

## REASONS FOR GRANTING THE PETITION

Although respondent knew of the sale by the Secretary of her fractional interests in the three allotments in 1954, and although the BIA's listing of her holdings in 1967 confirmed that the United States no

[3] The court left open for decision on remand the question whether 25 U.S.C. 483 prevented the Secretary from selling the allotments without respondent's consent (App., *infra*, 7a). Although the court seemed to indicate that this issue and the question whether payment was made bore on the statute of limitations issue, in reality they go directly to the merits of whether an unauthorized sale occured in 1954.

longer held those interests in trust for her, the court of appeals held that this suit filed 27 years after the sale is not barred by the statute of limitations. This result is plainly erroneous. The suit is barred either by the 12-year statute of limitations under the Quiet Title Act, 28 U.S.C. 2409a(f), or by the general statute of limitations in 28 U.S.C. 2401(a), which provides that "every civil action" against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. This follows, we submit, from *Block* v. *North Dakota*, 461 U.S. 273, 287-290 (1983), where it was held that the broad language in the Quiet Title Act imposing a statute of limitations on "[a]ny civil action," and the policies of respose reflected in that provision, require applying the statute of limitations to a suit brought by a State in the same manner as it applies to suits brought by other persons. The same principle requires the application of the statutes of limitations in the Quiet Title Act and 28 U.S.C. 2401(a) to civil actions against the United States that are brought by Indians. The implied exception the court of appeals fashioned for suits brought by Indians therefore cannot be squared with *Block* v. *North Dakota*.

Moreover, whatever the court of appeals' theory of this suit—whether it is a suit to quiet title, recover damages, or obtain an allotment—, its holding conflicts with decisions of other courts of appeals that have applied the applicable statute of limitations to suits brought by Indians under each of these theories. The decision below is of substantial practical importance as well, in view of the pendency of numerous other Indian claims based on comparably stale transactions. Review by this Court therefore is warranted.

1. The principles that govern the statute of limitations issue in this case have been firmly established by this Court. As the Court recently observed in another case



involving a dispute over title to land, "[t]he basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block* v. *North Dakota*, 461 U.S. at 287. The Court in that case reiterated the rule that even "[t]he States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Id.* at 280. This principle applies equally to suits by Indians. See, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980).

"A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block* v. *North Dakota*, 461 U.S. at 287. This corollary weighs equally against recognition of implied exceptions to the statute of limitations that Congress has imposed as a condition on its consent to suit. See, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957). Indeed, the terms of Congress's consent—including the applicable statute of limitations—" 'define th[e] court's jurisdiction to entertain the suit.' " *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). See *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 233 (1887). See also *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983).

The court of appeals in this case failed to respect these principles; in fact, it did not even discuss them. Instead, citing only *Ewert* v. *Bluejacket* and other decisions holding that *state* statutes of limitations do not bar suits by Indians against *private* parties, the court of appeals

held that the explicit *federal* statute of limitations in 28 U.S.C. 2401(a) that is applicable to "every civil action" against the *United States* does not apply to this suit by an Indian against the United States. The court of appeals' error was compounded by its failure even to identify the particular statute that it believed gave Congress's consent to this suit and by its evident confusion regarding the relief respondent seeks and the effect the nature of that relief has on the determination of which statute of limitations applies. But as we demonstrate in the next section, this suit is clearly barred by the statute of limitations no matter what legal theory of the suit the court of appeals intended to adopt.

2. a. As we have pointed out above (see page 5, *supra*), respondent dismissed the complaint in this suit insofar as it sought rescission of the 1954 sale of the three allotments and the revesting of title in respondent and the other heirs of the original allottees. This left only her claim for money damages. If we accept respondent's partial dismissal at face value, respondent's remaining suit for damages would appear to be one arising under the Tucker Act, 28 U.S.C. 1346(a)(2), in which event it is barred by the six-year statute of limitations that applies to such claims filed in district court by virtue of 28 U.S.C. 2401(a). See pages 14-17, *infra*.

The court of appeals, however, elected not to read respondent's partial dismissal as an abandonment of her basic contention that the sale of the parcels without her consent was void and that she therefore retains title to the land (App., *infra*, 4a, 6a). The court believed that the claim for damages should be construed as the equivalent of a claim for return of the land itself, because in its view respondent should be permitted to demand money damages in lieu of her interest in the land because the allotment is inaccessible to her in the Chippewa National Forest (*id.* at 6a-7a). The court



of appeals' conclusion that respondent continued to assert a claim of title to the land is quite strained. But if the court of appeals is correct in this regard, then this suit arises under the Quiet Title Act, 28 U.S.C. 2409a, and it is barred by the 12-year statute of limitations in that Act.

In the Quiet Title Act (QTA), Congress consented, with certain exceptions, to the naming of the United States as a party defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. 2409a(a).[4] This Court held in *Block* v. *North Dakota* that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." 461 U.S. at 286 (footnote omitted). The Court applied this rule in *Block* v. *North Dakota* to hold that a state may bring an action only under the QTA to establish its title to real property in which the United States claims an interest and that the procedural provisions of the QTA cannot be avoided by suing a federal officer. 461 U.S. at 280-286. So, too, the QTA is the exclusive means by which an Indian may bring an action, such as the instant suit, that challenges the United States' title to real property.[5]

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[4] Congress included in 28 U.S.C. 2409a(a) certain exceptions to this waiver of sovereign immunity—*e.g.*, for suits concerning trust or restricted Indian lands or actions that could be brought under several specified statutory provisions, such as the Tucker Act (28 U.S.C. 1346, 1491), and the McCarran Amendment (43 U.S.C. 666), which consents to the naming of the United States in certain water rights adjudications. See, *e.g.*, *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983).

[5] That Congress specifically focused on Indians when it enacted the QTA is demonstrated by the fact that the QTA expressly "does not apply to trust or restricted Indian lands." 28 U.S.C 2409a(a).

The Court likewise held in *Block* v. *North Dakota* that a state, like any other party who wishes to take advantage of the waiver of sovereign immunity in the QTA, must comply with the statute of limitations in 28 U.S.C. 2409a(f), which requires that "[a]*ny* civil action" under the QTA shall be barred unless it is brought within 12 years of the date on which it accrued. The Court relied on this all-inclusive statutory language, the absence of any indication in the legislative history of the QTA that suits brought by states were meant to be excluded, and the necessarily general policy of repose embodied in the limitations period to protect the national public interest. 461 U.S. at 287-290. These same considerations require the conclusion that the statute of limitations in 28 U.S.C. 2409a(f) also applies to suits brought by Indians to contest the United States' title to real property. See *Grosz* v. *Andrus*, 556 F.2d 972, 974-975 (1977).

Section 2409a(f) provides that an action under the QTA "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." In this

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This language was intended to exempt from Congress's waiver of sovereign immunity actions to quiet title to land that the United States holds in trust for Indians, and thereby to protect the United States and the Indian beneficiaries from litigation and adverse claims by others. See S. Rep. 92-575, 92d Cong., 1st Sess. 2 (1971); *Block* v. *North Dakota*, 461 U.S. at 283, 285. This exception does not exclude suits brought *by* Indians against the United States to challenge the United States' title to real property that it does *not* ostensibly hold in trust for Indians, but instead holds for other purposes (such as the National Forest in this case). See, *e.g.*, *Grosz* v. *Andrus*, 556 F.2d 972 (9th Cir. 1977). The absence of a parallel exception for suits in which Indians are plaintiffs reinforces the conclusion that such suits are within the scope of the QTA. As a result, an Indian plaintiff is treated the same as any other person who has a claim adverse to that of the United States, and the QTA accordingly is the Indian's exclusive avenue of relief.



case, the district court found that respondent knew of the sales in 1954 (Pet. App. 10a). This suit, which was commenced in 1981, more than a quarter of a century later, therefore is clearly barred by the 12-year statute of limitations under the QTA.

Although the court of appeals understood respondent to be asserting a claim of title, it did not even mention the applicability of the QTA (App., *infra*, 6a-8a).[6] The court of appeals' refusal to hold that respondent's claim is subject to and barred by the 12-year statute of limitations under the QTA was clearly in error. By contrast, the Ninth Circuit, in a suit under the QTA by the heirs of an Indian allottee challenging the United States' title to a right of way across an allotment, held that the suit was subject to and barred by the 12-year statute of limitations in 28 U.S.C. 2409a(f). *Grosz* v. *Andrus*,

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[6] In her complaint, respondent included 28 U.S.C. 1346 among the alleged bases of jurisdiction (C.A. App. 2). Subsection (f) of Section 1346 grants the district courts jurisdiction of QTA actions under 28 U.S.C. 2409a(f). Because respondent voluntarily had dismissed her claim for revesting of title on June 16, 1982 (C.A. App. 10), the United States' subsequent motion for summary judgment relied only on 28 U.S.C. 2401 in asserting that the suit is barred by the statute of limitations (C.A. App. 11). The district court, noting that respondent sought only damages (App., *infra*, 9a), held that the suit is barred by 28 U.S.C. 2401(a). The application of that provision therefore was the principal issue discussed in the government's brief on appeal. However, the government's brief also stated that "while not plead below, any action to quiet title to this land is barred as well by virtue of the twelve-year statute of limitations in 28 U.S.C. 2409a(f)." Gov't C.A. Br. 8 n.6. See also *id.* at 9 n.8. After the panel chose to construe respondent's complaint as nevertheless asserting a claim to title, the government addressed the application of the QTA at length in its petition for rehearing with suggestion for rehearing en banc. However, that petition was denied without comment (App., *infra*, 13a).

*supra*. This divergent treatment of suits challenging the United States' title to land that previously was in allotted status warrants review by this Court.

b. This suit is equally barred by the applicable statute of limitations even if it is treated as one for money damages—which is how the court of appeals chose to allow it to proceed. Viewed in this light, respondent is essentially seeking damages for an alleged breach of the United States' fiduciary duty by the Secretary when the three allotments were sold without her consent. In respondent's view, that sale violated 25 U.S.C. 483. However, such a suit for money damages must be brought under the Tucker Act, 28 U.S.C. 1346(a)(2),[7] on the theory that the payment of compensation is mandated by some other statute, such as 25 U.S.C. 483 or the directive in Section 5 of the General Allotment Act (25 U.S.C. 348) that the Secretary hold the allotment in trust until it is validly conveyed. *United States* v. *Mitchell*, 463 U.S. 206, 219-228 (1983) (*Mitchell II*); but see *United States* v. *Mitchell*, 445 U.S. 535, 540-546 (1980) (*Mitchell I*). Respondent in fact alleged in her complaint that the United States breached its fiduciary duty by selling the land without the consent of all the descendents, heirs, and assigns (C.A. App. 4-5). Respondent also alleged that the sale amounted to a taking of her property for a public use without just compensation, in violation of the Fifth Amendment (C.A. App. 5).[8] Jurisdiction over a suit for just compensation in

[7] The district courts and Claims Court have concurrent jurisdiction over suits for money damages under the Tucker Act where the amount in controversy is $10,000 or less. 28 U.S.C. 1346(a)(2) and 1491. Where the amount in controversy exceeds that amount, the Claims Court's jurisdiction is exclusive.

[8] Respondent did not specifically allege in the complaint that she did not receive her share of the proceeds of the 1954 sale of the allotments in which she held an interest.



those circumstances likewise lies under the Tucker Act. See *Block* v. *North Dakota*, 461 U.S. at 280-281; *Malone* v. *Bowdoin*, 369 U.S. 643, 647 n.8 (1962). However, any such suit necessarily is subject to the six-year statute of limitations in 28 U.S.C. 2401(a).[9]

Section 2401(a) provides that, except as provided under the Contract Disputes Act of 1978, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Just as the broad reference in the QTA's statute of limitations to "[a]ny civil action" includes actions filed by Indians, so too the broad reference in Section 2401(a) to "every civil action" includes civil actions filed by Indians—here, a suit under the Tucker Act for money damages.

There is no indication that Congress intended an implied exception from the plain language of Section 2401(a) for Tucker Act suits brought by Indians. To the contrary, in *Mitchell I*, this Court recognized the intent of Congress to treat Indians and non-Indians alike under the Tucker Act. There, the Court considered 28 U.S.C. 1505, which granted the Court of Claims jurisdiction over any claim for money damages against the United States by an Indian tribe. The Court quoted

[9] Respondent also alleged that the Secretary was "negligent" in selling the allotments without the consent of everyone who had an interest in them (C.A. App. 5). Perhaps respondent thereby intended to state a cause of action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* However, any claim under the FTCA is barred unless it is presented to the appropriate federal agency within two years after it accrues or unless the action is begun within 6 months of the notice of final denial of the claim. 28 U.S.C. 2401(b). See 28 U.S.C. 2675. This provision applies to a tort claim by an Indian. *Mann* v. *United States*, 399 F.2d 672, 673 (9th Cir. 1968). There has been no suggestion that respondent submitted a claim to the Department of the Interior within two years of the sale in 1954, and any action under the FTCA would clearly have long since been barred by the time this suit was filed in 1981.

the legislative history of the provision, which stated that the tribal claimants " 'are to be entitled to recover in the same manner, to the same extent, and *subject to the same conditions and limitations,* and *the United States shall be entitled to the same defenses,* both at law and in equity, . . . as in cases brought in the Court of Claims under [28 U.S.C. 1491].' " 445 U.S. at 539 (emphasis added), quoting H.R. Rep. 1466, 79th Cong., 1st Sess. 13 (1945). And it was specifically intended that such Indian tribal claims are to be governed by the six-year statute of limitations in the predecessor to 28 U.S.C. 2501 that is applicable in Tucker Act suits in the Court of Claims under 28 U.S.C. 1491. See *Creation of Indian Claims Commission: Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs,* 79th Cong., 1st Sess. 149 (1945) (section-by-section analysis submitted by Felix Cohen).[10] It would appear to follow a fortiori that Tucker Act claims brought in the Court of Claims (now the Claims Court) by individual Indians, which arise directly under 28 U.S.C. 1491 itself, likewise are governed by the six-year statute of limitations in 28 U.S.C. 2501.

Consistent with this view, the Court of Claims and Federal Circuit uniformly have held that suits brought by Indian tribes or individual Indians against the United States under the Tucker Act are subject to the six-year statute of limitations in 28 U.S.C. 2501. In so holding,

[10] The permanent provision for jurisdiction of tribal claims in the Court of Claims was intended to replace the prior regime of special jurisdictional acts. See *United States* v. *Dann,* No. 83-1476 (Feb. 20, 1985), slip op. 6-7. These acts often imposed time limitations for the consideration of Indian claims. See, *e.g.,* Act of June 3, 1920, ch. 222, 41 Stat. 738-739. In addition, Congress in 1946 created the Indian Claims Commission to adjudicate claims arising prior to 1946 (25 U.S.C. (1970 ed.) 70 *et seq.*), but it imposed a five-year statute of limitations on such claims as well. 25 U.S.C. (1976 ed.) 70k.



those courts rejected the proposition that the existence of a fiduciary or trust relationship between the United States and the Indians with respect to the property in question rendered the statute of limitations inapplicable. See, *e.g., Menominee Tribe* v. *United States,* 726 F.2d 718, 721-722 (Fed. Cir.), cert. denied, No. 83-1922 (Oct. 1, 1984); *Hydaburg Co-Op Ass'n* v. *United States,* 667 F.2d 64, 69-70 (Ct. Cl. 1981), cert. denied, 459 U.S. 905 (1982); *Fort Mojave Tribe* v. *United States,* 210 Ct. Cl. 727, 728 (1976); *Andrade* v. *United States,* 485 F.2d 660, 664 (Ct. Cl. 1973), cert. denied, 419 U.S. 831 (1974); *Capoeman* v. *United States,* 440 F.2d 1002 (Ct. Cl. 1971).[11] The holding of the court of appeals that respondent's suit for money damages is not barred by the six-year statute of limitations in 28 U.S.C. 2401(a) that applies to "every civil action" filed in district court, including those under the Tucker Act, directly conflicts with these decisions of the Federal Circuit and Court of Claims.

c. In addition to alleging jurisdiction under 28 U.S.C. 1346, which confers jurisdiction on the district court over quiet title and Tucker Act suits (28 U.S.C.

[11] In *Capoeman,* the Court of Claims rejected the argument that Indians are excluded from the running of the limitations period by the provision in 28 U.S.C. 2501 (which likewise appears in 28 U.S.C. 2401(a)) that the claim of a person "under legal disability or beyond the seas" at the time the claim accrues may be filed within three years after the disability ceases. See 440 F.2d at 1003-1005. The Court of Claims construed this language to refer to a legal disability that impaired the claimant's access to the court. *Id.* at 1004; see also *Goeway* v. *United States,* 222 Ct. Cl. 104, 113 (1979). Respondent clearly was under no such legal disability here; she was as capable of suing in 1955 as she was in 1981. See, *e.g., Poafpybitty* v. *Skelly Oil Co.,* 390 U.S. 365, 368-369 (1968). Cf. *Oneida II,* slip op. 7-8. The existence of this express exception for certain claimants who might be incapable of suing within the six-year period further reinforces the conclusion that Indians who are not under such a particularized disability are, like all other claimants, covered by the statutes of limitations in 28 U.S.C. 2401(a) and 2501.

1346(a)(2) and (f)), respondent also alleged that the district court had jurisdiction over this case under 25 U.S.C. 345 and 28 U.S.C. 1353 (C.A. App. 2). The former Section provides that all persons of Indian blood who are or claim to be entitled to an allotment of land under an Act of Congress, or who claim to have been unlawfully denied or excluded from any such allotment or parcel of land, may prosecute or defend "any action, suit, or proceeding" in relation thereto in the proper district court. Section 1353 of Title 28 provides that the district courts shall have original jurisdiction of "any civil action" involving the right of a person of Indian blood to any allotment of land under an Act of Congress or treaty. Section 1353 is "but a codification" of the provisions of 25 U.S.C. 345 (see *First Moon* v. *White Tail,* 270 U.S. 243, 245 (1926)), and the two therefore should be read in pari materia.

The principal purpose of these provisions obviously was to enable an Indian who claimed to be entitled to an allotment, but who was not granted one by the Secretary, to sue the United States to compel allowance of an allotment. See, *e.g., Arenas* v. *United States,* 322 U.S. 419 (1944). There may be some reason to question whether either 25 U.S.C. 345 or 28 U.S.C. 1353 was intended to provide a basis for jurisdiction over a suit against a third party to recover an allotment that was validly made to an Indian in the first instance but then was conveyed by the United States to that third party under an allegedly erroneous exercise of authority by the Secretary to dispose of allotments held in trust by the United States.[12] But see *Begay* v. *Albers,* 721 F.2d 1274, 1277 (10th Cir. 1983); *Fontenelle* v. *Omaha Tribe of Nebraska,* 430 F.2d 143 (8th Cir. 1970). But however that may be, it is doubtful that Section 345 was ever intended to confer jurisdiction over a cause of action for

[12] We note in this respect that Section 345 provides that the parties to the suit "shall be the claimant and the United States as party defendant."



money damages against the United States in such circumstances, especially since it prescribes a specific remedy of a wholly different sort and would not appear to mandate the payment of compensation. Compare *Mitchell II,* 463 US. at 217.[13]

In *First Moon* v. *White Tail, supra,* the Court held that the predecessor to 28 U.S.C. 1353 did not confer jurisdiction on the district court to entertain an action against the United States and the heir of the original allottee by another Indian who also claimed to be an heir of the allottee but had been determined by the Secretary not to be entitled to an interest in the allotment. The Court explained that the statutory provision "has reference to original allotments claimed under some law or treaty, and not to disputes concerning the heirs of one who held a valid and unquestioned allotment." 270 U.S. at 245. Similarly, in *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128, 142 (1972), the Court stated that "Section 345 authorizes, and provides governmental consent for, only actions for allotment." The Court cited for this proposition not only *First Moon* v. *White Tail, supra,* and *Arenas* v. *United States, supra,* but also two court of appeals decisions that held that Section 345 is limited to suits to determine the rights of a person of Indian blood to an allotment and "gives no general consent of the United States to be sued even in connection with its administration of allotments" (*United States* v. *Preston,* 352 F.2d 352, 355-356 (9th Cir. 1965); *Harkins* v. *United States,* 375 F.2d 239, 241 (10th Cir. 1967)). This case presents no

[13] Section 345 provides that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such such allotment had been allowed and approved by him." The latter phrase appears in essentially identical language in the second paragraph of 28 U.S.C. 1353.

question concerning the right of the original allottees to receive an allotment under the General Allotment Act or the Nelson Act; such allotments were made to the persons of whom respondent claims to be an heir. This suit instead is one concerning the United States' "administration of allotments" (*United States* v. *Preston*, 352 F.2d at 356)—namely, the Secretary's sale of the concededly valid allotments without respondent's consent, which respondent maintains was required not by Section 345, but by 25 U.S.C. 483.

For these reasons, jurisdiction over respondent's cause of action against the United States for damages, based either on the allegedly unlawful sale or an alleged failure to distribute respondent's share of the proceeds to her, arises under the Tucker Act, 28 U.S.C. 1346(a)(2), and therefore is barred by the six-year statute of limitations in 28 U.S.C. 2401(a). See *Vicenti* v. *United States*, 470 F.2d 845 (10th Cir. 1972), cert. dismissed, 414 U.S. 1057 (1973). Compare *Antoine* v. *United States*, 637 F.2d 1177, 1181-1182 (1981), opinion after remand, 710 F.2d 477 (8th Cir. 1983). Similarly, insofar as the court of appeals correctly understood respondent to be contesting the title of the United States, it is irrelevant whether respondent might have brought such an action under 25 U.S.C. 345 or 28 U.S.C. 1353 prior to the enactment of the QTA in 1972. The QTA is now the exclusive means by which any person, including an Indian, may obtain an adjudication of the disputed title to land in which the United States claims an interest. See *Block* v. *North Dakota*, 461 U.S. at 284-286. If the result were otherwise, all of the "carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest"—including in the QTA's 12-year statute of limitations—"could be averted." 461 U.S. at 284-285.[14]

[14] To the extent that Congress intended to preserve remedies against the United States under other statutory provisions when it enacted the QTA, it expressly so provided. See note 4, *supra*.



There is no need to consider further, however, whether 25 U.S.C. 345 and 28 U.S.C. 1353 furnish a basis for this suit against the United States. Even if they do, the suit remains barred by the six-year statute of limitations in 28 U.S.C. 2401(a). Section 2401(a) applies to "every civil action" commenced against the United States in district court, not merely actions arising under the Tucker Act. "[A]lthough one purpose of Section 2401(a) was to consolidate parts of the Tucker Act, Congress' adoption of the language 'every civil action' ha[s] gone further: it * * * 'created a general statute of limitations insofar as suits against the United States are concerned.' " *Walters* v. *Secretary of Defense*, 725 F.2d 107, 113 (D.C. Cir. 1983), quoting *Werner* v. *United States*, 188 F.2d 266, 268 (9th Cir. 1951). See also *Impro Products, Inc.* v. *Block*, 722 F.2d 845, 850 n.8 (D.C. Cir. 1983), cert. denied, No. 84-170 (Oct. 29, 1984); *Boruski* v. *United States*, 493 F.2d 301, 304 n.5 (2d Cir.), cert. denied, 419 U.S. 808 (1974); *Screven* v. *United States*, 207 F.2d 740, 741 (5th Cir. 1953).[15]

The court of appeals did not question the proposition that 28 U.S.C. 2401(a) states a general statute of limitations applicable to more than merely Tucker Act suits.

Congress's failure to include 25 U.S.C. 345 and 28 U.S.C. 1353 among these exceptions indicates that any right of action that previously might have existed under those provisions to challenge the United States' title to real property did not survive. In light of this Court's then-recent decision in *Affiliated Ute*, which was rendered on April 24, 1972 and gave Section 345 a narrow reading that would not appear to extend to such quiet title actions against the United States (see page 19, *supra*), it is understandable that Congress did not include an exception for such suits when it enacted the QTA on October 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176. Compare *Block* v. *North Dakota*, 461 U.S. at 282.

[15] Of course if another, more specific statute of limitations applies to a particular suit, such as that under the FTCA or QTA (28 U.S.C. 2401(b) or 2409a(f)), the more specific provision applies.

However, the court of appeals fashioned an implied exception to that provision for suits by Indians, relying on this Court's decision in *Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922). App., *infra*, 5a-6a. The court was clearly wrong in finding support for such an exception in *Ewert*.

The Court observed in *Ewert* that the suit by an Indian to recover property conveyed to a person prohibited by statute from purchasing it was not barred by the Oklahoma statute of limitations. See 259 U.S. at 137. However, as this Court observed in *Oneida II* (slip op. 13 n.13), this aspect of the holding in *Ewert* rests on the principle that under the Supremacy Clause, state law time bars do not apply of their own force to Indian land title claims against private parties. *Ewert* does not suggest that *federal* statutes of limitations might not apply to certain Indian land claims—especially those against the *United States*, not merely a private party, as in *Ewert*. In *Oneida II*, the Court in fact held that Indian damage claims even against private parties are subject to an implicit one-year limitations period under 28 U.S.C. 2415(a) and (b) and the Indian Claims Limitations Act of 1982, which begins to run when the Secretary notifies the Indian that he will not bring such an action on behalf of the Indian. *Oneida II*, slip op. 15-16. By their terms, Sections 2415(a) and (b) and the 1982 amendments, which the Court found applicable to the claim in *Oneida*, are concerned with actions "brought by" the United States against non-federal parties (or brought by Indians against such non-federal parties if the United States does not bring suit). As the legislative history of the bills extending the limitations period in 28 U.S.C. 2415 makes clear, that Section applies only to "certain claims of Indian tribes and individuals against parties *other than the United States*" (H.R. Rep. 97-954, 97th Cong., 2d Sess. 3 (1982) (emphasis added)). See also S. Rep. 92-1253, 92d Cong., 2d Sess. 3 (1972); H.R. Rep. 92-1267, 92d Cong. 2d Sess. 4



(1972). Land claims that Indians might have against the United States itself are subject to the generally applicable statute of limitations in the QTA and 28 U.S.C. 2401(a) and 2501. Indians, like all other persons, may sue the United States only under such conditions as Congress may impose.

In contrast to the Eighth Circuit's decision in this case, the Ninth Circuit has held that a suit by an Indian under 28 U.S.C. 345 is subject to the generally applicable statute of limitations in 28 U.S.C. 2401(a). *Christensen* v. *United States*, 755 F.2d 705 (9th Cir. 1985). Accord, *Big Spring* v. *United States*, No. 84-4170 (9th Cir. July 31, 1985); *Loring* v. *United States*, 610 F.2d 649 (9th Cir. 1979). Indeed, the plaintiff in *Christensen* has filed a petition for a writ of certiorari asserting that the Eighth Circuit's decision in this case conflicts with the Ninth Circuit's holding in *Christensen*. See 85-372 Pet. 6.

3. As we have explained above—whether this case is viewed as one to quiet title, recover money damages, or obtain an allotment—the decision below directly conflicts with decisions of other courts of appeals that have held that suits by Indians against the United States are subject to the generally applicable statute of limitations that governs each of those types of suits. These multiple circuit conflicts warrant resolution by this Court. The decision below also introduces considerable confusion into this area as regards the possible sources of jurisdiction over suits against the United States, and even against private parties, based on past transfers of trust or restricted Indian lands.

The questions presented also are of considerable practical importance. The so-called "Secretarial Transfer" cases, such as this one, represent a substantial number of potential Indian land claims. We have been informed by the Department of the Interior that more than 1000 allotments have been identified in the Aberdeen and

Minneapolis BIA areas alone in which transfers were made without the consent of all the heirs. We have been further informed that in excess of 15,000 acres in the Chippewa National Forest were acquired by the Department of Agriculture in transactions similar to those challenged by respondent here.

Similar issues arise in connection with "Forced Fee" cases, in which fee patents were issued to Indians who allegedly were not competent to receive them and the land then was sold to non-Indians. H.R. Rep. 97-954, *supra*, at 7. The statute of limitations issue has been raised in over 40 pending "Forced Fee" actions that already have been filed by individual Indians against the United States and that involve claims for land or money damages based on an allegedly void transfer of a restricted allotment.[16] The uncertainty occasioned by these and a potentially enormous number of other claims against the United States arising out of such past transactions involving Indian land warrants resolution by this Court of the important questions presented. See claims listed at 48 Fed. Reg. 13698-13920, 51204-51268 (1983); *Oneida II*, slip op. 15-16 n.15.

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[16] Several of these cases were dismissed on statute of limitations grounds, but an appeal has been taken from that dismissal. See *Nichols* v. *Rysavy*, Civ. No. 83-5002 (D.S.D. May 10, 1985), appeal pending, No. 85-5234 (8th Cir.).



## CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

CHARLES FRIED
*Acting Solicitor General*
F. HENRY HABICHT II
*Assistant Attorney General*
LOUIS F. CLAIBORNE
*Deputy Solicitor General*
EDWIN S. KNEEDLER
*Assistant to the Solicitor General*
DAVID C. SHILTON
J. CAROL WILLIAMS
*Attorneys*

SEPTEMBER 1985

**APPENDIX A**

# UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 83-2582

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS

*v.*

UNITED STATES OF AMERICA, APPELLEE

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Submitted: June 11, 1984
Decided: January 18, 1985

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Before HEANEY, JOHN R. GIBSON and FAGG, Circuit Judges.

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HEANEY, CIRCUIT JUDGE.

Florence Blacketter Mottaz[1] appeals the district court's dismissal of her "Secretarial Transfer"[2] suit against the United States on the ground the twenty-seven-year-old claim was time-barred by 28 U.S.C. § 2401(a) (1982). For the reasons set forth below, we reverse and remand.

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[1] Mottaz seeks to represent a class of similarly situated allottees, but her claim was dismissed before the class was certified.

[2] A "Secretarial Transfer" claim involves the Department of Interior's sale, pursuant to 25 U.S.C. §§ 483, 404 or 379 (1982), of restricted Indian allotments without the consent of all the beneficial heirs as allegedly required by these statutes and Department of Interior rules, regulations and policies. *See* 48 Fed.Reg. 13698-99 (1983).

## I. BACKGROUND

On December 5, 1905, three Chippewa Indian ancestors of plaintiff Florence Blacketter Mottaz received eighty-acre trust allotments on the Leech Lake Reservation in Cass County, Minnesota, pursuant to the General Allotment Act of February 8, 1887, 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1982) and the Nelson Act of January 14, 1889, 25 Stat. 642. These ancestors were her mother, Esther Taylor, a/k/a Esther Grasshopper; her mother's sister, Mary Knickerbocker; and the latter's son, David Knickerbocker. Title to their allotments was held in trust by the United States for periods which were eventually extended indefinitely. *See* 25 U.S.C. § 462 (1982). Mottaz inherited one-fifth of the Taylor allotment and one-thirtieth of the Knickerbocker allotments. In the early 1950's, some, but not all, of the heirs with fractional holdings petitioned the Department of Interior, pursuant to 25 U.S.C. § 483 (1952), to sell their allotments. Mottaz claims that this statute and Department of Interior regulations and policies prevent the Secretary of Interior from selling the allotment interest of a non-consenting owner. In May, 1953, the United States Department of the Interior's Office of Indian Affairs sent to Mottaz forms which were captioned "Consent to Sale of Inherited Lands" for her Taylor and Knickerbocker allotments. The letters which accompanied the consent forms read in relevant part:

> Some of the owners have requested the sale of this land. We have appraised both land and timber, if any, and as soon as we get the consent to sell, an effort will be made to obtain a buyer by advertising for sale bids. This land will not be sold unless the high bid is equal to, or more than, the appraisal value. *If no reply is received from you within ten (10) days, it will be assumed that you have no objection to the sale.* [Emphasis added.]



Mottaz did not sign and return the consent forms to the Office of Indian Affairs.

Although apparently fewer than one-half of the Indian land-owners who received the notices returned them consenting to the sale, the government nonetheless sold the land in 1954. All three of the Mottaz allotments were sold to the United States Forest Service and they are now included within the Chippewa National Forest. Mottaz claims that she did not consent to the sale of her land, and that she did not receive payment for it. The government claims that she did receive payment in 1955.

in 1967, Mottaz visited the Bureau of Indian Affairs (BIA) and received a list of all her allotment interests. The list did not show that she had an interest in the Taylor or two Knickerbocker allotments. In 1981, she again requested from the BIA a list of her allotment interests. The BIA indicated that she had held an interest in the Taylor and Knickerbocker allotments and that she might have a "Secretarial Transfer" claim under the "2415 Land Claims Project" [3] on the ground her land was sold without her consent.

On December 30, 1981, Mottaz filed a complaint in United States District Court on her own behalf and on behalf of other Indians with similar secretarial transfer claims. Her complaint alleged that the Taylor and Knickerbocker allotments were sold without her consent and thus their sale was illegal and void, that her property had been taken without due process and just compensation, and that the BIA's sale of the allotments without her consent was negligent and a breach of fiduciary duty. She sought damages in the amount of the fair market value of the Taylor and Knickerbocker allotments or rescission of their sale with title to revest

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[3] *See* 48 Fed.Reg. 13698 and *Covelo Indian Community* v. *Watt*, 551 F.Supp. 366 (D.D.C.1982).

in the heirs. Following a pretrial hearing on June 6, 1982, Mottaz withdrew her demand for rescission of the sale leaving only her demand for money damages in the amount of fair market value of the land. We do not, however, read this amendment of her complaint to mean that she abandoned the gist of her complaint which was that the sale of her land was illegal and void and did not transfer title. Rather, for practical reasons, she sought the equivalent of the land in damages rather than a return of the land itself.

On October 7, 1983, the district court granted the government's motion for summary judgment on the ground that Mottaz's action was barred by the six-year statute of limitations of 28 U.S.C. § 2401(a) (1982). The court cited no case where a court held that secretarial transfer claims are time-barred by section 2401, but relied on the following plain language of the statute:

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The court held that Mottaz's cause of action accrued when she learned of the sale in 1954, and because she did not file suit until 1981, her suit was barred. This appeal followed.

## II. DISCUSSION

The parties below agreed that the summary judgment motion would address only "procedural issues" and not the underlying "substantive issues." This prevented the district court from fully considering whether Mottaz's claim was time-barred.

**[1, 2]** It has been well established since *Ewert* v. *Bluejacket*,[4] 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922),

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[4] In *Ewert*, the Court held that the

> Court of Appeals * * * while properly regarding the limitations statutes of Oklahoma as inapplicable, held the adult heirs were barred by laches in failing to institute suit after delivery of the deed to the land. In this the court fell into error.
>
> * * * The purchase by Ewert being prohibited by the statute was void. * * * He still holds the legal title to the land and the equitable doctrine of laches, developed and designed to protect good faith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions.

259 U.S. at 137-38, 42 S.Ct. at 444 (citations omitted).



and *Hampton* v. *Ewert*,[5] 22 F.2d 81 (8th Cir. 1927), *cert. denied*, 276 U.S. 623, 48 S.Ct. 303, 72 L.Ed. 737 (1928), that a sale of restricted allotment land in violation of the federal restrictions on its alienability does not transfer title, and that the allottee or her heirs may not be barred by state statutes of limitation or laches from bringing suit to establish that they retain title to the land. *Haymond* v. *Scheer*, 543 P.2d 541, 545 (Okla. 1975);[6] *Smith* v. *Williams*, 78 Okla. 297, 190 P. 555, 557 (1920); *cf. Antoine* v. *United States*, 637 F.2d 1177, 1179-81 (8th Cir. 1981).

**[3]** The parties cite no case which squarely considered whether *Ewert* prevents the application of *federal* stat-

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[5] In *Hampton*, 22 F.2d at 92, this Court held that an action to recover the value of minerals taken under an invalid lease of allotment land was not barred by laches because the principle set forth in *Ewert* v. *Bluejacket* "applies equally to all transactions which are void because of failure to observe statutory restrictions" on the alienability of allotment land.

[6] In *Haymond*, 543 P.2d at 545, the court held that

> A conveyance of allotted restricted Indian lands made in violation of a federal statute authorizing the alienation of such lands is against public policy and absolutely void, and in no manner [including the passage of time] can any right, title or interest in such land be acquired under such a conveyance.

*Quoting Miller* v. *Tidal Oil Co.*, 106 Okla. 212, 233 P. 696 (1925).

utes of limitation. However, we agree with amicus that Congress has not repudiated its policy of protecting Indian land by providing that claims against the United States for title to wrongfully alienated allotments are barred by a statute of limitations. The district court relied upon the general statute of limitations for claims against the United States set forth in 28 U.S.C. § 2401 (1982). This statute provides that all civil actions commenced against the United States are barred unless filed within six years after the cause of action first "accrues." However, this statute does not bar claims of title to allotments because *Ewert* is based on the principle that, if the underlying sale of land is void, the concept that a cause of action "accrues" at some point is inapplicable because the allottee simply retains title all along.

The government argues, however, that Mottaz does not seek simply to establish title to the Taylor and Knickerbocker allotments, but seeks to obtain damages for the government's alleged negligence and breach of fiduciary duty. Although we agree that Mottaz's complaint is not particularly well-drafted, we believe it must be read as raising the one essential claim that her land was sold without her consent, that she did not receive payment for her land, and that accordingly the sale was void and she retains title to the land. We believe that, on the narrow facts of this case, her claim for damages in the amount of the fair market value of the land must be construed as equivalent to a claim for return of the land itself. If the government sold Mottaz's land to the United States Forest Service without her consent and without sending her fair compensation, then, in light of the land's subsequent incorporation within an inaccessible national forest where the land has little value to Mottaz, as a matter of policy, we believe it is a fair and practical remedy, on the narrow facts alleged here, for



Mottaz to seek compensation rather than return of the land.[7]

**[4]** Thus, the statute of limitations issue cannot be resolved until several underlying factual and legal predicates are resolved. First, the district court must determine whether 25 U.S.C. § 483 (1952) and Department of Interior rules, regulations and policies in effect in 1953 prevented the Secretary of Interior from selling Mottaz's land without first obtaining her consent. If so, it must determine whether Mottaz consented to the sale. We hold that her failure to return the "Consent to Sale" form does not constitute consent. However, if she received payment for the land in 1955, then, on the facts of this case, we believe it may be assumed that she consented to the sale and thus that she does not have a cause of action. The government must bear the burden of proving that it paid Mottaz and therefore that it holds valid title to the Taylor and Knickerbocker allotments.[8] If the government did not pay Mottaz, then it does not hold title to her allotments until she receives payment

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[7] In other words, Mottaz's complaint alleges that her land was sold without her consent and that she should at least receive payment for the land. If the government failed to send her payment, then, until it does so, it has not acquired title to the Knickerbocker and Taylor allotments. In effect, she seeks the payment for the land which she claims she never received.

[8] The district court found that Mottaz "received her share of the proceeds in 1955." *Mottaz* v. *United States,* No. 3-81-1098, slip op. at 1 (D.Minn.1983). We find nothing in the record which supports this finding, and the parties at oral argument agreed that whether or not Mottaz received payment for the land has not yet been established. The government argued that the payment records may be difficult if not impossible to recover and that this is a good reason why a statute of limitations should bar Mottaz's claim. However, in light of the government's apparent sale of Mottaz's land without her consent as allegedly required by 25 U.S.C. § 483, we find that it is reasonable to require the government at least to prove that it paid for the real estate it now claims to own. Indeed, another factor

equal to the fair market value of the land. In light of the land's inclusion within the Chippewa National Forest and the thirty years which have passed since the sale, we find that if Mottaz's claims have merit, then she may force the government to pay her the fair market value of the land rather than to simply return the land itself.

Reversed and remanded for further proceedings consistent with this opinion.

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behind the *Ewert* principle is that it is generally expected that records necessary to prove title to land will be kept indefinitely unlike records concerning torts, contracts or other causes of action.



**APPENDIX B**

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

---

Civil File No. 3-81-1098

FLORENCE BLACKETTER MOTTAZ, PLAINTIFF

*v.*

UNITED STATES OF AMERICA, DEFENDANT

---

**MEMORANDUM ORDER**

---

This matter is before this court upon defendant's motion for summary judgment. A hearing was held before the undersigned on September 23, 1983. Derck Amerman, Esq., and Leonard Zolna, Esq., appeared on behalf of plaintiff. Larry Martin Corcoran, Esq., and Mariana Shulstad, Esq., appeared on behalf of defendant.

This action arises out of the sale of land by the Bureau of Indian Affairs (BIA) in 1954. Plaintiff is an heir to Chippewa Indians who, in 1905, received land allotments on the Leech Lake Indian Reservation in Cass County, Minnesota. The land allotments were held in trust by the United States for the benefit of the heirs of the original grantees. In 1954 the (BIA) decided to sell the allotments and distribute the proceeds to the heirs. All the living heirs, including the plaintiff, were notified of the proposed sale and given time to object. The plaintiff did not object to the sale and she received her share of the proceeds in 1955. The plaintiff now seeks damages for the sale on the ground that it was made without her consent and is void.

The defendant argues that the plaintiff's claims are barred by 28 U.S.C. § 2401. This court agrees. 28 U.S.C. § 2401(a) provides that:

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

Plaintiff filed this action in 1981, twenty-seven years after the land was sold and twenty-six years after the proceeds were distributed to her by the (BIA). The essence of the plaintiff's complaint is that the land was sold without her consent. Even if that were true, the plaintiff's claim is still barred because the sale occurred nearly a quarter century before the commencement of this action. The plaintiff's cause of action accrued when she learned of the sale. The deposition of the plaintiff clearly reveals that she had knowledge of the sale in 1954.

The plaintiff argues that 28 U.S.C. § 2401(a) does not apply to suits by Indians for breach of a fiduciary duty. That argument is untenable. By its very terms 28 U.S.C. § 2401(a) applies to *"every civil action commenced against the United States. . . ."* The present action is a civil action against the United States and is governed by the six-year statute of limitations contained in 28 U.S.C. § 2401(a).

Plaintiff also argues that 28 U.S.C. § 2415 overrides the statute of limitations contained in 28 U.S.C. § 2401(a). 28 U.S.C. § 2415 applies to actions brought *on behalf of* a recognized tribe or individual Indian. In *Oneida Indian Nation of New York State* v. *County of Oneida,* 94 S.Ct. 772 (1974), the Supreme Court permitted an Indian tribe to bring an action. However, the Court did not interpret 28 U.S.C. § 2415 to permit



claims *against* the United States. Claims against the United States are governed by 28 U.S.C. § 2401(a).

For the reasons stated above, IT IS HEREBY ORDERED that:

1. Defendant's motion for summary judgment is granted.

Dated: October 6, 1983.

/s/ PAUL A. MAGNUSON

Paul A. Magnuson
United States District Judge

# United States Court of Appeals

## FOR THE EIGHTH CIRCUIT

## JUDGMENT

| | | |
|---|---|---|
| No. 83-2582 | * | SEPTEMBER TERM 1984 |
| Florence Blacketter Mottaz, on behalf of herself and all others similarly situated, | * | |
| Appellants, | * | |
| v. | * | Appeal from the United |
| United States of America, | * | States District Court for |
| Appellee. | * | the District of Minnesota |

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause is hereby reversed and the cause remanded for further proceedings in accordance with the opinion of this Court.

January 18, 1985



**APPENDIX D**

## UNITED STATES COURT OF APPEALS
## FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1984

---

No. 83-2582-MN.

FLORENCE BLACKETTER MOTTAZ,
ETC., ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

Appeal from the United States District Court
for the District of Minnesota

---

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

April 29, 1985

## APPENDIX E

### STATUTORY PROVISIONS INVOLVED

1. 25 U.S.C. 345 provides:

**Actions for allotments**

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided,* That the right of appeal shall be allowed to either party as in other cases.



2. 25 U.S.C. 483 provides:

**Sale of land by individual Indian owners**

The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the provisions of sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title, or subchapter VIII of this chapter.

3. 28 U.S.C. 1353 provides:

**Indian allotments**

The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.

The judgment in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands held on or before December 21, 1911, by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency.

4. 28 U.S.C. 2401 provides:

**Time for commencing action against United States**

(a) Except as provided in the Contact Disputes Act of 1978, Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first

accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) a [A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

5. 28 U.S.C. 2409(a) provides in pertinent part:

**Real property quiet title actions**

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title [28 USCS §§ 1346, 1347, 1491, or 2410], sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), [26 USCS §§ 7424, 7425, and 7426], or section 208 of the Act of July 10, 1952 (43 U.S.C. 666) [43 USCS § 666].

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part



thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

* * * * *

(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

6. 28 U.S.C. 2501 provides:

**Time for filing suit**

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title [28 USCS § 1497] shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account.

No. 85-546 (2)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DERCK AMERMAN
LEONARD A. ZOLNA, JR.
*Attorneys for Respondent*
2408 Central Avenue N.E.
Minneapolis, MN 55418
(612) 789-8805

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## QUESTION PRESENTED

DOES THE GENERAL STATUTE OF LIMITATIONS, 28 U.S.C. 2401(a), BAR AN ACTION UNDER 25 U.S.C. 345 INVOLVING SPECIFIC LAND ALLOTMENTS WHERE THE CLASS CONSISTS OF INDIANS WHOSE LAND ALLOTMENTS WERE HELD IN TRUST FOR THEM BY THE UNITED STATES AND WERE SOLD WITHOUT THE CONSENT OF ALL THE OWNERS AND WITHOUT A COURT HEARING OR PROCEEDING?

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No. 85-546

IN THE

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OCTOBER TERM, 1985

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UNITED STATES OF AMERICA,

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vs.

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

*Respondent.*

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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### STATEMENT

The respondent is a Chippewa Indian of the Pillanger Band, who filed this action on December 30, 1981, seeking damages from the petitioner, United States of America, who held Indian land in trust for original allottees, their descendants, heirs and assigns, and transferred said trust allotments without consent or permission of said allottees, their descendants, heirs and assigns, including land owned by the plaintiff. The action is brought as a yet uncertified class action pursuant to Rule 23 of Federal Rules of Civil Procedure on behalf of herself and all others similarly situated. There are three apparent classes at this time: (1) all

of those descendants, heirs and assigns of the original allottees relating to land that is located in the Leech Lake area of Cass County, Minnesota; (2) all of those descendants, heirs and assigns of the original allottees relating to the land that is located in the State of Minnesota. (3) all of those descendants, heirs and assigns of the original allottees relating to the land that is in the United States of America.

As the records indicate, in the Leech Lake area alone, there were 6,111 heirs in the 1950's. Consents obtained were from only 2,914 heirs. It is estimated that there are over 10,000 innocent victims located in the Leech Lake area alone. In addition, the Department of the Interior has indicated that there is a problem of significant magnitude in the Northern Great Plains area as well and perhaps in other areas of the United States (C.A.App. Exhibit 2).[1] The exact number of victims in each area remains undisclosed at this time.

Correspondence from the Department of the Interior itself indicates that the transactions represented in this class were "void", were a "direct result of an unauthorized administrative action" and of "BIA misfeasance". "The problem is that between 1948 and 1958 BIA officials approved numerous conveyances of inherited allotments without the requisite consents of all of the Indian landowners. This was done notwithstanding a June 24, 1955 Memorandum from the Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs advising that the interest of a non-consenting owner may not be sold by the Secretary. As a result, it appears that numerous transactions were entered into without the requisite authority and are, therefore, void." (C.A.App. Exhibit 1).

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[1]C.A.App. refers to the appendix in the Eighth Circuit Court of Appeals.



It should be noted that this uncertified class action is not one for actual return of the property. There are, therefore, no innocent third parties nor bona fide purchasers for value that will be damaged if the relief prayed for is granted. It would seem that the defendant has an obligation not only to the plaintiffs in this class action who have had their property taken without their consent and without due process of law but also to protect the innocent third parties and bona fide purchasers for value by making restitution to the class of respondent in this action and thereby bar a future action in which innocent third parties and bona fide purchasers for value may suffer severe damage.

Petitioner continues to paddle semantics in its discussion and characterizes respondent as having dropped her claim for title. At no time in this proceeding did respondent drop her claim for title. To the contrary, the claim for title is the essence and bottom line of respondent's case. Her position is simply that the land remains in the name of Mottaz and the other heirs of the property despite what some pieces of paper executed by petitioner without her consent and without a court hearing purport to do. Part of the confusion arises over the failure to distinguish between a liability theory and a theory relating to an election of remedies for damages between the land itself and money. Theoretically, the land has remained in the name of Mottaz and the other heirs. The decision of the Eighth Circuit confirms this position. However, as a practical matter, some pieces of paper were issued by the petitioner and the problem remains as to how to treat those pieces of paper, which have now been filed of record with the County Recorder in Cass County, Minnesota. This is what the word "rescission" more properly refers to. When we talk about rescission, we talk about

a court order that will change the effect of those pieces of paper. The decision of the Eighth Circuit reflects the fact that a void transfer cannot effectively change title. If someone purported to transfer title to my house by executing an agreement that said that it was transferred from me to a grantee and if this was done without my consent or without some judicial determination allowing the transfer, it would be void and those pieces of paper would not theoretically change my ownership. However, it would create a pragmatic problem if the papers were filed wtih the County Recorder's office. The Eighth Circuit recognized the problem that respondent faces if the land is simply declared to be still in her name. In order to grant meaningful relief, then, in addition to the "liability issue", the "damages" issue also needs resolution. In order to accomplish this, the respondent and other heirs to the Mottaz property and the members of this uncertified class, or those that choose to do so, have then made an election of remedies on their damages, to-wit, to accept money damages representing the value of the land. This is probably the only workable solution for a class action, and as the Eighth Circuit recognized the only workable solution in the Mottaz situation because of the fact that there is no access to the parcel of land. This was all due to the actions of the United States that held the land in trust for the heirs and descendants of the original allottees. Without the additional remedy of being able to elect damages as an alternative, there would be no practical meaningful remedy for either Mottaz and the heirs on these parcels or other members of the class. Practical considerations, however, dictate that the class make an election of remedies to accept money as the measure of damages.

According to the Bureau of Indian Affiars (BIA) rec-



ords, three (3) Chippewa Indian ancestors of the respondent received trust allotments on the Leech Lake Reservation, located in the County of Cass, State of Minnesota, on December 5, 1905. The trust allotments were made pursuant to the *General Allotment Act of February 8, 1887*, 24 Stat. 388, 25 U.S.C. 331 et seq., and the *Nelson Act of January 14, 1889*, 25 Stat. 642. Title to these allotments were held in trust by the United States for a period of twenty-five (25) years and then extended indefinitely when the reservation voted to accept the provisions of the *Indian Reorganization Act of June 18, 1934*, 48 Stat. 985, 25 U.S.C. 461 et seq., specifically, Section 2, 25 U.S.C. 462. These trust allotments are identified as Leech Lake 855, 856, and 857, and were each 80 acres in size.

Respondent inherited a share of these allotments from her mother, Esther Taylor, aka Esther Grasshopper, LL-857, her mother's sister, Mary Knickerbocker, LL-855, and the latter's son, David Knickerbocker, LL-856. In 1954, during the extended trust period, these lands were transferred by the Department of the Interior to the United States Forest Service and now form part of the Chippewa National Forest. Respondent *never* made an application for the sale of these allotments, and she *never* signed a consent form approving the sale. Respondent *never* received payment and no proof of payment has ever been produced by petitioner. (Pl. Depos. p. 46).

In its Statement, petitioner asserts that some of the heirs who own fractional interests of the three (3) Mottaz allotments petitioned the Department of the Interior to sell the allotments. There was absolutely no showing at any of the stages in this proceeding that any of the heirs to the Mottaz allotments petitioned for sale. On the contrary, the form

referred to at the bottom of page 2 was a mimeographed form that was apparently mailed out to all of the heirs of any of the parcels of land that petitioner had decided it wanted. The form itself was very misleading and, in fact, untrue. It suggested to the Indian recipient that other people involved in their particular allotment parcels had petitioned for sale. What the mimeographed form in fact stated, if it is to have any truth at all, is that some people involved in some of the parcels in Cass County may have requested the sale of their land. This was not, however, the three (3) Mottaz allotments. As the Statement correctly indicates in the case of these three (3) allotments, the United States as trustee sold the three (3) parcels to itself. The Eighth Circuit Court of Appeals specifically held in Mottaz that the failure of Mottaz to return the "Consent to Sale" form does not constitute consent.

Petitioner has argued that the "sales" were authorized under 25 U.S.C. 483, which "reinstated" the *Act of June 25, 1910,* 36 Stat. 855, 25 U.S.C. 372. The *Act of 1948* may have, in effect, repealed restrictions imposed under *The Indian Reorganization Act of 1934*, but we do not agree that the *Act of 1910* was fully reinstated. The language of the *Act of 1948,* 25 U.S.C. 483, clearly placed additional conditions on the sale of trust allotments, beyond the requirements of 25 U.S.C. 372. The *Act of 1948* specifically states that the Secretary of Interior is authorized to sell the property "upon application of the Indian owners". The petitioner in its Motion for Summary Judgment in the trial court stated that after 1958 all such sales were made only of the fractional interest of *consenting* heirs. This modified procedure was followed even though no new statutes were passed since 25 U.S.C. 483 was enacted in 1948.



During the summer of 1981, respondent contacted an attorney for the first time to examine another allotment not in dispute in this case. After reviewing her papers, her attorney contacted the Bureau of Indian Affairs concerning the lands in dispute in this case, LL-855, LL-856, and LL-857. On or about November 25, 1981, an agent of the Bureau of Indian Affairs, in a telephone conversation with respondent's attorney, stated that respondent had a claim under the "2415 Land Claims Project", where allotments were sold and not all of the heirs conveyed their interest in the allotment (C.A.App. Exhibits 5 & 6). Upon notification that she had a cause of action, the respondent filed this lawsuit, which was commenced on December 30, 1981.

In short, this action was brought by an Indian respondent concerning her loss of interest and rights in allotment lands, which were sold by the petitioner without her application and consent, thereby depriving her of possession, use, enjoyment, and any income and improvements thereof.

Congress has clearly expressed a concern to protect such interest by enacting specific Indian laws that cannot be overridden by general laws that were *never* intended to apply to these special grants or rights. Furthermore, the petitioner, to its benefits, breached its fiduciary responsibility to the respondent by selling her allotment land without her consent to itself.

## ARGUMENT

### JURISDICTION:

The district court below had jurisdiction to hear this claim pursuant to 25 U.S.C. 345, and 28 U.S.C. 1346 (a)(2) and (b).

The issues of jurisdiction and the government's trust re-

sponsibility involved in this case have been in effect decided by the two cases of *United States v. Mitchell,* 100 S.Ct. 1349 (1980) and *United States v. Mitchell,* 102 S.Ct. 2961 (1983), referred to respectively hereafter as *Mitchell I* and *Mitchell II*.

These historic decisions clarified the jurisdictional issue for actions brought against the United States, and provided a test for determining if money damages are available in such a suit. The test includes:

1) Statute providing consent to suit by the United States;

2) Substantive right to money damages must be found in some statute or regulation; and

3) Source of substantive law relied upon "can fairly be interpreted as mandating compensation" for the damages sustained. *Mitchell II*, supra, page 2967, 2968.

This case has been brought by an Indian Plaintiff, on behalf of herself and all others similarly situated, against the United States, concerning their loss of interest and rights in allotment lands.

These requirements are clearly met under 25 U.S.C. 345, which provides jurisdiction to hear claims concerning allotments brought by Indians. There is no statute of limitations and no limitations in the amount in controversy. Since 1901, the United States is required to be a party defendant in any such action and this is the only amendment to that statute. The petitioner has consented to suit under 25 U.S.C. 345. There is no dispute within the Circuit Courts of Appeal that 25 U.S.C. 345 provides jurisdiction and contains the necessary consent to bring suit



against the United States. *Arenas v. United States,* 322 U.S. 419, 64 S.Ct. 1090 (1944); *Antoine v. United States,* 637 F.2d 1177, 1181 (8th Cir. 1981); *Scholder v. United States,* 428 F.2d 1123, 1125-26 (9th Cir. 1970).

The requirements are also met under 28 U.S.C. 1346 since this court has determined in *Mitchell II,* supra, page 2967, that if a claim falls within the terms of the "Tucker Act", the United States has consented to suit. Although the *Mitchell II* case was based on a Court of Claims action where the "Tucker Act" is now found at 28 U.S.C. 1491, it follows that its counterpart in the district courts, which is now found at 28 U.S.C. 1346, would also provide jurisdiction and consent to suit.

There are other substantive laws that demonstrate a right to money damages. It is important to note that the Supreme Court in *Mitchell II* did not require that the substantive laws which a plainitff relies on to specifically state that money damages are available but merely to "fairly be interpreted as mandating compensation", *Mitchell II,* supra, page 2968, nor do the substantive statutes have to provide a second waiver of sovereign immunity. *Mitchell II,* supra, page 2969.

The monetary damage issue under a 25 U.S.C. 345 action was decided in the Indian plaintiff's favor by the Eighth Circuit Court of Appeals in *Antoine v. United States,* 637 F.2d 1177 (1981), wherein it was stated, "Moreover, the language of 25 U.S.C. 346 compels the conclusion that Congress intended to permit damage suit against the Unitetd States under section 345." See *Antoine,* supra, page 1182. The Ninth Circuit has also foliowed this rule on 25 U.S.C. 345 claims. *Scholder v. United States,* 428 F.2d 1123, cert. denied, 400 U.S. 942 (1970); *United*

*States v. Pierce,* 235 F.2d 885; *Gerard v. United States,* 167 F.2d 951. Furthermore, an enforceable right to money damages can be found under 25 U.S.C. 348, 349, 354, 372, and 483.

In *Mitchell I* the United States Supreme Court held that the *General Allotment Act* provided a limited trust relationship as to the government's responsibility to manage timber on Indian allotment lands. *Mitchell I* was remanded on other grounds and the Claims Court, 664 F.2d 265 (1981), held that the United States was subject to suit under various other statutes and regulations. The defendant's Petition for Certiorari, 457 U.S. 1104 (1982), was granted and on June 27, 1983, the United States Supreme Court in *Mitchell II* held:

> "that if the "claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit." *Mitchell II,* supra, page 2967.
>
> "It nonetheless remains true that the Tucker Act "does not create any substantive right enforceable against the United States for money damages. . . A substantive right must be found in some other source of law, such as "the Constitution or any Act of Congress, or any regulation of an executive department." . . . The claim must be one for money damages against the United States . . . and the claimant must demonstrate that the source of substantive law he relies upon "can fairly be interpreted as mandating compensation. . ." *Mitchell II,* supra, page 2969.
>
> "Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." *Mitchell II,* supra p. 2969.



The Supreme Court in *Mitchell II* reaffirmed the existence of the trust relationship between the government and Indians, or Indian Tribes, that "includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." *Mitchell II,* supra, page 2973. The Supreme Court held that the rules and elements of a common-law trust apply:

> "All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds). Because the statutes and regulations at issue clearly establish a fiduciary obligation of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Government for damages sustained." *Mitchell II,* supra, page 2973.

The Court went on to discuss the necessary and inevitable consequences of a trust relationship and stated that if there is no liability for damages for breach of that trust, the trust itself is meaningless.

> "Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. See Restatement (Second) of the Law of Trusts, Sections 205-212 (1959); G. Bogert, The Law of Trusts & Trustees, section 862 (2d ed. 1965); 3 A. Scott, The Law of Trusts, section 205 (3d ed. 1967). This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured benefici-

ary to sue the trustee for damages resulting from breach of the trust." *Mitchell II*, supra, page 2973.

*Mitchell II* has in effect decided Mottaz. The *Mitchell II* case concerned a breach of trust for mismanagement of timber lands while this case involves a breach of trust for the alienation or sale of Indian trust property which resulted in a direct benefit to the trustee. While the Court in *Mitchell II* said that the *General Allotment Act* itself did not impose any management duties on the United States, the Act does prohibit the sale or alienation of the allotted lands:

> "The trust language of the Act does not impose any fiduciary management duties or render the United States answerable for breach thereof, but only prevents improvident alienatiton of the allotted lands and assures their immunity from state taxation." *Mitchell II*, supra, page 2968.

If discretionary mismanagement is compensable, it follows *a fortiori* that outright sales without consents should be compensable. Complete elimination of the trust property is a greater wrong than diminishing the value of the trust property.

In this case, the initial relationship of the United States as trustee, the Indian allottees as beneficiary, and the lands as the trust corpus is established by the *General Allotment Act of 1887* itself, and should provide an enforceable right to money damages. Furthermore, the independent provisions of 25 U.S.C. 348, 349, 354, 372, and 483, specifically establish a trust relationship and an enforceable right to money damages.



## STATUTE OF LIMITATIONS

The Eighth Circuit Court of Appeals has properly held that 28 U.S.C. 2401(a) does not apply to a void transfer of Indian trust lands under the principles enunciated in *Ewert v. Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922).

That court recognized the special trust relationship between the United States and Indian allottees by holding that the respondent's claim was not barred by the six (6) year statute (28 U.S.C. 2401(a)) "because *Ewert* is based on the principle that, if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along." *Mottaz, et al. v. United States of America*, 753 F.2d 71, 74 (1985) .

While *Ewert* did not involve a federal statute of limitations in a suit against the United States, it did involve a government agent, working on allotment transactions, who violated a statutory provision that no government employer should have any interest or concern with the Indian and his or her allotment. This court in *United States v. Hutto*, 256 U.S. 524, 41 S.Ct. 541 (1921), noted that the purpose of the *Ewert* statute was "to protect the inexperienced, dependent, and improvident Indians from the avarice and cunning unscrupulous men in official position, and . . . to prevent officials . . . to speculate on that inexperience or upon the necessities and weaknesses of these wards of the nation."

In *Ewert* a public official was not allowed to hide behind the shield of a statute of limitations. There was also no expressed trust relationship with the Indian in that case. In Mottaz, there is a breach of an expressed trust created

under the *General Allotment Act of 1887* with the United States as trustee, the Indian allottees as beneficiaries, and the land as the trust corpus. In Mottaz, the trustee not only sold the trust property without the application or consent of the Indian owners but also benefited from the sale because it sold to itself. It should not be allowed to hide behind the statute of limitations in this case.

The General Allotment Act of 1887 contains a clear expressed trust within Section 5 of the Act, providing that title to allotments are to be held in trust by the United States. This distinguishes the Mottaz case from the holding against the Indians in *Menominee Tribe v. United States,* 726 F.2d 718, cert. denied, 105 S.Ct. 106 (1984), in which the court noted that there was no express trust in that case. See also *Mitchell II,* supra, page 2973, reaffirming the existence of the trust relationship between the government and the Indians where statutes clearly establish a fiduciary obligation.

In *Ewert,* the court quoted the following general rule from *Waskey v. Hammer,* 223 U.S. 85, 94 (1912):

> "The general rule is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer."

Petitioner has erroneously expressed concern that the Eighth Circuit's holding in Mottaz is in direct conflict with the Court of Claims position on Indian claims and the application of the statute of limitations, 28 U.S.C. 2401. Petitioner cites *Menominee Tribe v. United States,* 726 F.2d 718, 722 (1984), cert. denied 105 S.Ct. 106 (1984), but that opinion stated that the ruling might be different if an expressed trust was present. As explained above, the Mottaz



case does involve an expressed trust. Also, the Court of Claims does not have jurisdiction over 25 U.S.C. 345 claims. Original jurisdiction is in the District Court, and there are no jurisdictional limitations. Clearly, the Eighth Circuit's holding in Mottaz is not in conflict with the Court of Claims.

The Petition discusses *Christensen v. United States,* 755 F.2d 705 (1985), a Ninth Circuit decision. We see no conflict with Mottaz. That court applied a statute of limitations to a dispute over access to an allotment. *Loring v. United States,* 610 F.2d 649 (9th Cir. 1979) was a right-of-way case. Mottaz involves a void *sale* of trust lands. The *Christensen* court apparently felt compelled to follow another Ninth Circuit decision, *Loring,* supra. This was a confusing case where the plaintiffs never alleged federal jurisdiction under 25 U.S.C. 345. It may well be that if the *Loring* case had been argued from the start as a 25 U.S.C. 345 case rather than as an ordinary civil action, the court would have reached a different result. In *Vincenti v. United States,* 470 F.2d 845 (10th Cir., 1972), the statute of limitations was raised as a defense but the court held against the Indian plaintiff on other grounds. *Big Spring v. United States,* 767 F.2d 614 (1985), was a case involving the reservation of mineral rights to the tribe rather than being included in the allotment to individual Indians. In that case, the Ninth Circuit Court of Appeals in Footnote No. 1 specifically stated that *Big Spring* was not in conflict with the Eighth Circuit's holding in *Mottaz* because of the completely different facts involved in the two cases.

Petitioner also raises the Quiet Title Act of 1972, 28 U.S.C. 2409 a(f). his does not seem to make any serious difference concerning the statute of limitations issue. The Eighth Circuit Court of Appeals held that the six (6) year

statute "does not bar claims of title to allotments because *Ewert* is based on the principle that, if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along". This analysis would, of course, apply to a 12 year statute of limitations as well as a six (6) year statute of limitations. Also, the Quiet Title Act only applies to those that are relying on the waiver of sovereign immunity contained in that Act. In this case, Mottaz is relying on 25 U.S.C. 345. In addition, 2409 a(a) specifically states that: "This section does *not* apply to trust or restricted Indian Lands. . ." (Emphasis added). Inasmuch as this is obviously trust land, it seems clear that the Quiet Title Act would not apply. *Spaeth v. United States Secretary of the Interior, et al.*, 757 F.2d 937 (8th Circuit, 1985) establishes that if there is "a substantial possibility that the lands in question are trust or restricted Indian lands" then the exception for Indian trust lands contained in the Quiet Title Act make it inapplicable .

Additional support for not applying the statute of limitations include the following:

**STATUTE OF LIMITATIONS, 28 U.S.C. 2401 (a), DOES NOT APPLY TO INDIAN LAND ALLOTMENTS STATUTE 25 U.S.C. 345**

**A. THE ORIGIN AND HISTORY OF 28 U.S.C. 2401 (a), CLEARLY SHOW THAT IT WAS NOT INTENDED TO APPLY TO 25 U.S.C. 345 ACTIONS.**

A review of the origins of 28 U.S.C. 2401(a) *conclusively* shows that this statute was never intended to apply to 25 U.S.C. 345 actions. 28 U.S.C. 2401(a), a general



statute of limitations, was enacted in 1948, c. 646. 62 stat. 971, and was originally part of 41(20) of Title 28 of the 1940 Code. The relevant language of 41(20) in the 1940 Code was the same in the 1926 Code and in the 1911 codification of the Judicial Code where it originated, c. 231, section 24, 36 Stat. 1093. 41(20) of Title 28 was *not a general statute of limitations,* but rather a *jurisdictional* statute that contained a *statute of limitations,* which stated that it was applicable to the actions enumerated within 41(20). There can be no question that when 41(20) was enacted, that it did not pertain to actions brought under 25 U.S.C. 345, because that type of claim was and still is authorized under an entirely different provision of the law.

During the recodification of the Judicial Code in 1948, 41(20) of Title 28, the subject matter jurisdiction and the statute of limitations pertaining to those enumerated claims were divided, with subject matter jurisdiction now codified at 28 U.S.C. 1346, and the statute of limitations now codified at 28 U.S.C. 2401.

There is no evidence that Congress intended any changes in the substantive provision of the law as it existed prior to 1948, therefore, 28 U.S.C. 2401 cannot be interpreted as an expansion of the six year statute of limitations to include Indian allotment actions brought under 25 U.S.C. 345.

No legislative history discloses any such intention in 1948, and none could be found in the amendments to 28 U.S.C. 2401 in 1949, 1959, 1966, and 1978. Furthermore, the Chief Revisor of the Judicial Code, Title 28, stated in an article written shortly after the 1948 revisions, Barron, *The Judicial Code,* 8 F.R.D. 439, 445-46 (1949):

> "Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments *no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.*
>
> Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.
>
> Congress recognized this rule by including in its reports the complete Revisor's Notes to each section in which are noted all instances where change is intended and the reason therefor." (Emphasis supplied).

A review of the Revisor's Notes finds no such expressed intent to place a limitation on Indian allotment actions under 28 U.S.C. 2401(a).

Furthermore, the general rule of law of statutory revisions is that "unless such intention is clearly expressed" no changes of law or policy can be presumed. *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199, 32 S.Ct. 626 (1912); *United States v. Ryder*, 110 U.S. 729, 4 S.Ct. 196 (1884); and *McDonald v. Hovey*, 110 U.S. 619, 4 S.Ct. 142, 146 (1884). In *McDonald*, supra, the Supreme Court ruled on an issue similar to Mottaz, namely whether a revised statute concerning limitations on actions was intended as an expansion of its previous meaning and construction. The Court held that such a revision cannot change its meaning unless there is clear evidence that Congress intended to change it:

> "So upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form



> of the law. Sedg. Const. St. 365. As said by the New York Court for the correction of errors, in *Taylor v. Delancy*, 2 Caines, Cas. 150: 'Where the law antecedently to the revision was settled, either by clear expressions in the statutes or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law unless such phraseology evidently purports an intention in the legislature to work a change' ". (*McDonald*, supra, at page 146).

In short, former section 41(20) of Title 28 pertained only to actions enumerated within that statute, while actions involving Indians and their allotment lands were authorized under an entirely different statute, 25 U.S.C. 345. Secondly, the terms of neither statute, 41(20) nor 25 U.S.C. 345, nor the Revisor's Notes to 28 U.S.C. 2401, nor the legislative history indicate an intention to place a new limitation on actions under 25 U.S.C. 345. No limitation existed prior to the 1948 recodification, and there is no *clearly expressed intention* in the 1948 Revised Code to place this statute of limitations on claims under 25 U.S.C. 345. Therefore, 28 U.S.C. 2401(a) does not apply to 345 actions.

### B. THE GENERAL STATUTE OF LIMITATONS 28 U.S.C. 2401 (a) DOES NOT APPLY TO SPECIFIC INDIAN LAND ALLOTMENT ACTIONS UNER 25 U.S.C. 345, SINCE A GENERAL LAW IS NOT DESIGNED TO LIMIT SPECIFIC RIGHTS OR GRANTS.

The courts have historically given favorable construction to specific Indian statutes. In *Antoine v. United States*, 637 F.2d 1177 (1981), the Eighth Circuit Court of Appeals, in a 25 U.S.C. 345 claim for money damages, states:

> "We first emphasize that a statute designed to safeguard the rights of Indians is to be broadly interpreted so as to give the Indians the maximum protection possible under the language of the enactment." (*Antoine*, supra, at page 1179).

Ordinary rules of statutory construction support the position that, a general law will not affect special acts unless it is clearly expressed. The Eighth Circuit Court of Appeals in *Hemmer v. United States,* 204 F. 898, 906 (1916), noted that:

> "Privileges granted to a certain class by special act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But the special act and the general law stand together, the one as the law of the particular class and the other as the general rule."

When dealing with special rights granted to Indians, the courts have held that "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Elk v. Wilkins,* 112 U.S. 94, 5 S.Ct. 41, 44 (1884). This principle has not been rejected by the Supreme Court in *F.P.C. v. Tuscarora Indian Nation,* 362 U.S. 99 (1960). The land in dispute in the *Tuscarora* case was held by the Indians in *fee* not by the government in *trust*. This important distinction was noted in a Ninth Circuit decision, *United States v. Truckee-Carson Irrigation District, State of Nevada,* 649 F.2d 1286, 1298 (1981). For a reaffirmance and a detailed analysis of the court's application of these rules of construction, see Cohen, *Handbook of Federal Indian Law,* (1982 ed.) pages 282-286.



Federal courts have consistently reviewed 25 U.S.C. 345 claims for issues other than the issuance of the original allotments. The Eighth Circuit in *Antoine v. United States,* 637 F.2d 1177 (1981), allowed an allottee money damages in lieu of possession of an allotment. A boundary dispute was involved in *Fontenelle v. Omaha Tribe of Indians,* 298 F. Supp. 855 (1969).

The Ninth Circuit has allowed money damages and stated that the purpose of 25 U.S.C. 345 is to "protect or preserve an allotment once issued". *Scholder v. United States,* 428 F.2d 1123, 1126 (1970). That case involved irrigation construction charges that became liens on allotment land. Also, in the same circuit money damages were allowed for loss of rental income collected by the United States acting in their trust capacity, *United States v. Pierce,* 235 F.2d 885 (1956). See, also, in the same circuit, *Sampson v. United States,* 533 F.2d 499 (1976); *Gerard v. United States,* 167 F.2d 951 (1948) and *Arenas v. United States,* 322 U.S. 419 (1944).

In *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 92 S.Ct. 1456 (1972), there was a finding against the Indian allottee but not because the suit was not for an original allotment. The court held that the mineral interest in dispute was not appurtenant to an allotment. "Although the interest in the mineral estate . . . perhaps could be made the subject of an allotment, it has never been so subjected. Nor is it appurtenant to an allotment. It remains tribal property." *Affiliated Ute Citizens,* supra, page 1467.

## C. CONGRESS HAS EXPRESSED AN INTENT IN 28 U.S.C. 2415 AND THE INDIAN CLAIMS ACT OF 1982 THAT THESE ACTIONS NOT BE BARRED.

The background behind 28 U.S.C. 2415 is set forth in *Covelo Indian Community v. Watt,* 551 F. Supp. 366 (D.C.C. 1982). In summary, prior to 1966, there was no general statute of limitations applicable to the United States as plaintiff in cases seeking money damages against third parties. In 1966, Congress sought to correct this perceived inequity by passing the statute of limitations contained in 25 U.S.C. 2415. §2415(c) specifically provides that no time limits were placed on actions "to establish the title to, or rights of possession of, real or personal property." Under §2415, actions accruing prior to July 18, 1966 were deemed to have accrued on that date.

In late 1971, as the initial six year period drew to a close, Indians and government officials became concerned that pre-1966 claims might be extinguished with the running of the statute of limitations on July 18, 1972, unless the federal government took action to identify, evaluate, and where appropriate, file lawsuits to assert those Indian claims. The Department of Interior ardently supported an extension of the statute of limitations for pre-1966 Indian claims so that claims could be identified and filed. 118 Cong. Rec. 28117 (August 14, 1972), reprinted in (1972) U.S. Code Cong. & Ad News 3592, 3595. Consequently, in 1972, Congress extended the time in which the United States could assert pre-1966 claims on behalf of Indians to July 18, 1977. P.L. 92-485, 86 Stat. 803 (Oct. 13, 1972).

Once again in 1977, at the urging of the Department of Interior and the Department of Justice, Congress extended the federal statute of limitations insofar as it applied to



actions for money damages brought by the United States on behalf of Indians with pre-1966 claims. P.L. 95-103, 91 Stat. 842 (August 15, 1977).

On March 27, 1980 the time was extended until December 31, 1982. Then, largely in response to *Covelo,* supra, in which the inadequacies of the federal government's claims identification program were exposed, and, in conjunction with a strong lobbying effort, the Indian Claims Act of 1982, 96 Stat. 1976 was passed extending the time period again for a period of one year if Congress publishes a notice rejecting such claims or three years if a legislative solution is proposed.

Approximately 4,683 title claims (secretarial transfers such as the one here and forced fees) were identified under the Statute of Limitations Project. Many more were called to the attention of the government and placed on a second list published on November 7, 1983. Federal Register Vol. 48, No. 216, pp. 51, 204-51, 268. As stated previously, a common factor among these title claims is federal complicity. If 25 U.S.C. 345 is ultimately determined to be the exclusive remedy for actions on allotments and/or if the United States is viewed as indispensable to such actions even where suit is brought against third parties to recover the land (points not conceded but nevertheless issues which have been raised as defenses in South Dakota) and if 28 U.S.C. 2401 is held to apply to all causes of action against the United States, then 28 U.S.C. 2415 would be useless as to a substantial portion of the most important claims. This would directly frustrate the federal policy expressed in that act of allowing the claims covered by the act to be brought so long as the time limits therein are observed.

## CONCLUSION

The undisputed evidence in this case indicates a systematic deprivation of the property rights of the individual members of this class consisting of heirs and assignees of the original Indian allottees. The United States had a specific statutory fiduciary duty to protect this land and not to transfer it without the consent of the Indians or without a court hearing and due process of law. If relief is not granted to this class of victims in this type of class action, there is no other adequate remedy available to right these wrongs and a massive injustice will occur. In short, there will be a wrong without a remedy for thousands of innocent people who placed their trust in the United States. We feel that the Eighth Circuit Court of Appeals recognized this problem and also the principle enunciated in *Ewert v. Bluejacket*, 259 U.S. 129 (1922), that a void transfer of restricted allotment land does not transfer title and that the allottee or heirs should not be barred by statutes of limitation. Furthermore, there is no actual conflict between the Circuit Courts. A Writ of Certiorari in this case should not be granted.

Respectfully submitted,

DERCK AMERMAN
LEONARD A. ZOLNA, JR.
*Attorneys for Respondent*
2408 Central Avenue N.E.
Minneapolis, MN 55418
(612) 789-8805

# APPENDIX

## APPENDIX A

Additional Statutory Provisions Involved:

1. 28 U.S.C. 41(20), Predecessor Statute to Section 2401 (a), prior to recodification

*Suits against United States.*

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. Nothing in

this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the Civil War, and commonly known as "war claims", or to hear and determine other claims which had been rejected or reported on adversely prior to the 3d day of March 1887 by any court, departent, or commission authorized to hear and determine the same, or to hear and determine claims for pensions, or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the 27th day of June 1898 shall abate or be affected by this provision. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (Mar. 3, 1911, ch. 231, §24, par. 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, §1310(c), 42 Stat. 311; June 2, 1924, 4:01 p.m., ch. 234, §1025(c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972. Feb. 26, 1926, ch. 27, §§1122(c), 1200, 44 Stat. 121, 125.)

No. 85-546



# In the Supreme Court of the United States

OCTOBER TERM, 1985

---

UNITED STATES OF AMERICA

*v.*

FLORENCE BLACKETTER MOTTAZ, ETC.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## REPLY BRIEF FOR THE UNITED STATES

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CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES

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## REPLY BRIEF FOR THE UNITED STATES

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1. Respondent essentially concedes that the question of the application of the federal statutes of limitations to suits by Indians against the United States is of substantial practical importance. Thus, she expresses her agreement with the Department of the Interior that there is a problem of "significant magnitude" in the Northern Great Plains area with respect to potential claims based on sales of allotments that allegedly were made without the consent of all of the heirs. Br. in Opp. 2, quoting C.A. App. Exh. 2. Indeed, she asserts (Br. in Opp. 2) that in the Leech Lake area of Minnesota alone, there are several thousand interests in former allotments that would be affected by the holding below that the federal statutes of limitations do not apply to suits against the United States based on such transactions.

Moreover, as we have explained (Pet. 24), similar questions are presented in the more than 40 "Forced Fee" cases that already have been filed against the United States, and

those questions also are implicated in the thousands of other past transactions that were identified by the Department of the Interior in connection with Congress's extension of the statute of limitations in 28 U.S.C. 2415, which this Court discussed in *County of Oneida* v. *Oneida Indian Nation* (*Oneida II*), No. 83-1065 (Mar. 4, 1985), slip op. 15-16 n.15. Petitioner makes no effort to explain why an issue of such broad importance does not warrant review by this Court.

2. Respondent continues to express confusion regarding the nature of her suit. Although respondent insists (Br. in Opp. 3-4) that she has not abandoned her claim of title,[1] she insists at the same time (Br. in Opp. 7-12) that this is a suit for money damages. But even viewing this suit as solely one for money damages, respondent is wrong in contending that it is not barred by the statute of limitations.

Respondent first asserts (Br. in Opp. 7-9) that the district court has jurisdiction over this suit under the Tucker Act, 28 U.S.C. 1346(a)(2), by virtue of this Court's decisions in *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). We agree that the Tucker Act would furnish the basis of jurisdiction for a damage action such as this, but the exercise of that jurisdiction now is barred by the six-year statute of limitations in 28 U.S.C. 2401(a), which respondent concedes (Br. in Opp. 17) is applicable to Tucker Act suits brought in district court.

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[1]Because respondent continues to claim title to her former interests in the allotments, she errs in arguing (Br. in Opp. 16) that this suit is not barred by the 12-year statute of limitations in the Quiet Title Act (QTA), 28 U.S.C. 2409a(f). For the reasons stated in the petition (Pet. 11-12 & n.5), the QTA applies to a suit brought by an Indian to settle a disputed question of title to land held by the United States where, as here, the United States does not claim title to the land on behalf of Indians. By contrast, in *Spaeth* v. *Secretary of the Interior*, 757 F.2d 937 (8th Cir. 1985), upon which respondent relies (Br. in Opp. 16), the United States' claim of title was on behalf of Indians.



Respondent also contends (Br. in Opp. 8-10), however, that she can recover damages under 25 U.S.C. 345. Respondent is wrong. Respondent does not contend that the sale of the allotments in question violated 25 U.S.C. 345. She maintains that the sale violated 25 U.S.C. 483, because it allegedly was made without her consent. Thus, if any statute creates a substantive right to money damages in this case, it must be either 25 U.S.C. 483 or other statutory provisions that bar the sale of an allotment if not authorized by Congress. See, *e.g.*, 25 U.S.C. 348, 464. A suit seeking to recover damages from the United States under those provisions, like such a damage action arising under any other Act of Congress, can be brought in district court only under the Tucker Act.

That the Tucker Act is the exclusive basis for respondent's damages action is evident from the text of the Tucker Act itself, which grants the district courts jurisdiction over civil actions against the United States, not exceeding $10,000 in amount, that are "founded * * * upon * * * *any* Act of Congress" (28 U.S.C. 1346(a)(2) (emphasis added)). Moreover, in *Mitchell I* and *Mitchell II*, the plaintiffs sought to recover money damages based on violations of fiduciary duties imposed by various statutes governing the administration of allotments, and their suit was brought under the Tucker Act. Respondent similarly asserts (Br. in Opp. 10-12) that the Secretary's actions in this case violated fiduciary duties imposed by 25 U.S.C. 483 and other statutes. Respondent's efforts to recover money damages for these alleged violations therefore must also rest on the Tucker Act, subject to the six-year statute of limitations in 28 U.S.C. 2401(a).

3. Respondent contends (Br. in Opp. 13-14, 24), however, that the court of appeals correctly held that 28 U.S.C. 2401(a) does not apply to a claim based on a void transfer of Indian trust lands. The court of appeals acknowledged that, under 28 U.S.C. 2401(a), all civil actions against the United

States are barred unless filed within six years after the cause of action first "accrues." But the court read this Court's decision in *Ewert* v. *Bluejacket*, 259 U.S. 129 (1922), to stand for the proposition that "if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along." Pet. App. 6a. This reading of *Ewert* is plainly wrong.

The Court held in *Ewert* that the Oklahoma statute of limitations did not bar a suit by an Indian to recover property that was conveyed to a person who was prohibited by federal law from purchasing it. 259 U.S. at 137. As this Court made clear in its opinion in *Oneida II* (slip op. 13 n.13), which was handed down after the court of appeals rendered its decision in this case, the holding in *Ewert* rests on the principle that under the Supremacy Clause, state-law time bars are entirely inapplicable to Indian land title claims against private parties. The Court's opinion in *Ewert* says nothing about when a cause of action would have accrued under the Oklahoma statute of limitations if it *did* apply. *Ewert* therefore lends no support whatever to respondent's contention (and the court of appeals' conclusion) that a cause of action *never* "accrues" for purposes of the six-year statute of limitations in 28 U.S.C. 2401(a) if the claim is based on an allegedly void transaction. Nor has respondent or the court of appeals cited any other support for that novel proposition, which would render meaningless in this context the six-year statute of limitations that Congress expressly applied to "every civil action" against the United States.[2]

---

[2] *Oneida II* involved a transaction that was void because it did not receive the approval of the federal government. The Court held that the state statute of limitations did not apply by virtue of the Supremacy Clause and that the Tribe's damages action instead was subject to the statute of limitations in 28 U.S.C. 2415(a) and (b) and the Indian Claims Limitations Act of 1982, 28 U.S.C. 2415 note. Slip op. 12-16. The Court clearly did not intend that 28 U.S.C. 2415 nevertheless would be rendered inapplicable on the theory that the Oneidas' claim, which was based on a transaction that had occurred 190 years earlier, had not yet even "accrued."

Similarly, if this Court should hold in *South Carolina* v. *Catawba Indian Tribe of South Carolina*, No. 84-782, that Congress intended to make the South Carolina statute of limitations applicable to claims by the Catawba Tribe, then under the rationale urged by respondent and adopted by the court of appeals in this case, that statute of limitations presumably would be rendered nugatory with respect to the very transaction at issue in *Catawba* because the sale of the land to South Carolina in 1840 allegedly was void under the Trade and Intercourse Act and the Catawba Tribe's right of action therefore has not yet "accrued."



Respondent also advances this same rationale for avoiding the 12-year statute of limitations under the Quiet Title Act (QTA), 28 U.S.C. 2409a(f). See Br. in Opp. 15-16. However, the text of the QTA refutes respondent's submission. Under 28 U.S.C. 2409a(f), "[a]ny civil action" under the QTA is barred unless it is commenced within 12 years of the date upon which it "accrued." The QTA then specifies that an action "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." This provision makes clear that a cause of action accrues when the plaintiff knows or should know of the United States' *claim* of title, irrespective of whether that claim is valid or is instead based on an underlying transaction that is void. There is no basis for giving a different interpretation to the term "accrues" in 28 U.S.C. 2401(a).

4. Respondent erroneously asserts (Br. in Opp. 14-16) that there is no conflict between the decision below and the decisions of other courts of appeals regarding the application of federal statutes of limitations to suits by Indians against the federal government.

a. As we have explained (Pet. 16-17), the Court of Claims and Federal Circuit consistently have held that the six-year statute of limitations in 28 U.S.C. 2501, which parallels 28 U.S.C. 2401(a), is fully applicable to suits by Indians against the United States, despite the existence of a fiduciary relationship under the statutes involved. Respondent attempts (Br. in Opp. 14-15) to distinguish the Federal Circuit's recent reaffirmation of that principle in *Menominee Tribe* v. *United States*, 726 F.2d 718, 721-722 (Fed. Cir. 1984), cert. denied, No. 83-1922 (Oct. 1, 1984), on the ground that the court there suggested that the statute of limitations might not apply in the case of an "express trust." 726 F.2d at 722. The court did not elaborate in *Menominee* upon the nature of any such narrow exception. But the Court of Claims previously had explained the scope of that exception in its decision in *Capoeman* v. *United States*, 440 F.2d 1002 (Ct. Cl. 1971), which the Federal Circuit reaffirmed in *Menominee*. The court suggested in *Capoeman* that the statute of limitations in 28 U.S.C. 2501 might be inapplicable to a suit by an Indian only if it involved a liquidated claim for money, if the money had been appropriated by Congress, and if the government did not contest the validity of the claim. 440 F.2d at 1003. See also *Christensen* v. *United States*, 583 F. Supp. 1539, 1540-1541 (D. Nev. 1984), aff'd, 755 F.2d 705, 706-707 (1985), petition for cert. pending, No. 85-372.[3]

The narrow exception just suggested plainly has no application here. Respondent has not brought this suit to recover a liquidated and appropriated sum of money that has been held continuously for her express benefit, and any

[3]In our memorandum responding to the certiorari petition in *Christensen*, we suggest that the petition be held and disposed of in light of the Court's disposition of the petition in this case. We are furnishing counsel for respondent with a copy of our response to the memorandum for the respondents in *Christensen*.



trust relationship that previously existed with respect to the former allotments involved in this case was terminated when they were sold in the 1950s. The far broader proposition respondent advances based on the mere existence of a fiduciary relationship — which would render federal statutes of limitations wholly inapplicable to suits by Indians — has been emphatically rejected by the Federal Circuit.

b. Respondent also contends (Br. in Opp. 16) that the decision below does not conflict with the Ninth Circuit decisions discussed in the certiorari petition (Pet. 23), in which suits by Indians under 25 U.S.C. 345 were held to be barred by 28 U.S.C. 2401(a). It is true that the Ninth Circuit in those cases did not specifically address respondent's novel argument that 28 U.S.C. 2401(a) does not apply to a claim based on an allegedly void conveyance of Indian land, since that precise set of facts was not involved in the Ninth Circuit cases. But the Ninth Circuit clearly *has* rejected respondent's underlying premise (Br. in Opp. 13-15, 19-21) that 28 U.S.C. 2401(a) has a unique application to suits by Indians. See *Christensen*, 755 F.2d at 706-707; *Big Spring* v. *United States Bureau of Indian Affairs*, 767 F.2d 614, 616-617 (9th Cir. 1985).

5. Respondent next argues (Br. in Opp. 16-19) that if this case arises under 25 U.S.C. 345, as she maintains, it is not barred by the statute of limitations because 28 U.S.C. 2401(a) applies only to suits under the Tucker Act. Respondent relies on the fact that prior to the 1948 revision of Title 28, a six-year statute of limitations was contained in 28 U.S.C. (1946 ed.) 41(20), which conferred Tucker Act jurisdiction on the district courts, but not in 28 U.S.C. (1946 ed.) 41(24), which conferred jurisdiction over suits involving the right of an Indian to an allotment. Respondent argues that for this reason, 28 U.S.C. 2401(a) should also be applied only to Tucker Act suits.

Respondent's contention is refuted by the plain language of the relevant statutory provisions. The former Section 41(20) of Title 28 (emphasis added) provided that "[n]o suit against the Government of the United States shall be allowed *under this paragraph* [*i.e.*, under the Tucker Act] unless the same shall have been brought within six years after the right accrued for which the claim is made". By contrast, 28 U.S.C. 2401(a) (emphasis added) — which appears in Chapter 161 of Title 28, entitled "United States as Party *Generally*" —provides that "*every* civil action commenced against the United States" (with one exception not relevant here) shall be barred unless commenced within six years of the date upon which it accrued. Congress thus clearly made the statute of limitations in 28 U.S.C. 2401(a) applicable not only to suits arising under the Tucker Act (to which the limitations period in 28 U.S.C. (1946 ed.) 41(20) was expressly confined), but to "every" civil action against the United States.

Respondent's argument for avoiding the application of 28 U.S.C. 2401(a) by reference to the pre-1948 version of the Tucker Act was not adopted by the court of appeals in this case, and it has not been accepted by any other court of appeals. Indeed, it has been rejected by the Ninth Circuit in the specific context of suits by Indians under 25 U.S.C. 345 (*Christensen*, 755 F.2d at 706), and, as we have pointed out in the petition (Pet. 21), the other courts of appeals that have considered the question have held that 28 U.S.C. 2401(a) applies to suits other than those for money damages under the Tucker Act. Accordingly, even if respondent were correct that jurisdiction over this suit rests on 25 U.S.C. 345 rather than the Tucker Act, it is barred by 28 U.S.C. 2401(a).

6. We have sufficiently answered respondent's remaining contention (Br. in Opp. 22-23) that this suit is governed by the statute of limitations in 28 U.S.C. 2415, rather than that



in 28 U.S.C. 2401(a) or the QTA. See Pet. 22-23. Section 2415 governs suits brought *by* the United States on behalf of Indians against non-federal parties (or brought by Indians themselves against such non-federal parties if the United States does not sue). It does not apply to suits against the United States. Suits by Indians against the United States in district court are subject to the explicit statutes of limitations in the QTA and 28 U.S.C. 2401(a) that apply, respectively, to "[a]ny" and "every" civil action against the United States.

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
*Solicitor General*

NOVEMBER 1985

DOJ-1985-11

(5)

No. 85-546

# In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

*v.*

FLORENCE BLACKETTER MOTTAZ, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## JOINT APPENDIX

DERCK AMERMAN
LEONARD A. ZOLNA, JR.
*2408 Central Avenue, N.E.*
*Minneapolis, Minnesota 55418*
*(612) 789-8805*
*Counsel for Respondents*

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*
*Counsel for Petitioner*



**PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 26, 1985**
**CERTIORARI GRANTED NOVEMBER 18, 1985**

51 P

# In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-546

UNITED STATES OF AMERICA, PETITIONER

*v.*

FLORENCE BLACKETTER MOTTAZ, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

**JOINT APPENDIX**

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* The opinions of the district court and the court of appeals, the judgment of the court of appeals, and the order denying the petition for rehearing are printed in the appendix to the petition for writ of certiorari and have not been reproduced.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

81-1098

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

**RELEVANT DOCKET ENTRIES**

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 12/30/81 | 1 | COMPLAINT—CLASS ACTION Issued Summons ASSIGNED TO MAGNUSON-J per M. L. 667 Vol. V |
| 1/15/82 | 2 | SUMMONS ret'd served 1/8/82 |
| 3/3/82 | 3 | DEFENDANT'S MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE ANSWER for 30 days |
| 3/3/82 | 4 | ORDER (Magnuson-J 3/4/82) that deft. is granted an extension of time to and including April 8, 1982 within which to file its Answer. |
| | 5 | NOTICE TO COUNSEL |
| 4/8/82 | 6 | ANSWER |
| 5/25/82 | 7 | ENTRY OF APPEARANCE OF Larry Martin Corcoran in place of Arthur E. Gowran |
| 6/16/82 | 8 | MINUTES OF PROCEEDINGS (Boline-Mag;) IN RE *PRETRIAL CONFERENCE* |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 6/18/82 | 9 | ORDER (Boline-Mag: 6/17/82) THAT NON-DISPOSITIVE MOTIONS BE HEARD BEFORE Dec. 31, 1983; that dispositive motions be noticed/served before Feb. 1, 1982; that discovery be complete on/before Jan. 2, 1984 and that case be ready for trial by date set by Court |
| | 10 | NOTICE TO COUNSEL |
| 6/19/82 | 11 | PARTIAL DISMISSAL OF PORTION OF COMPLAINT – dismissed without prejudice. |
| 8/11/83 | 12 | DEFTS MOTION FOR SUMMARY JUDGT |
| | 13 | NOTICE OF HEARING OF DEFT MOTION FOR SUMMARY JUDGT ret. before Judge Magnuson Sept. 23, 1983 at 2:00 p.m. |
| | 14 | DEFTS. EXHIBITS |
| | 15 | AFFIDAVIT OF STEVEN D. TIBBETTS (Separate) |
| 9/9/83 | 16 | DEFTS MOTION FOR LEAVE TO FILE REPLY |
| 9/14/83 | 17 | AFFIDAVIT OF HOPE BREWER |
| 9/21/83 | 18 | STIPULATED FACTS |
| 9/23/83 | 19 | MINUTES (Magnuson-J) Deft. mo. for summary judgt-under advisement |
| 10/7/83 | 20 | MEMORANDUM ORDER (Magnuson-J; 10/6/83) Defts. motion for summary judgt. is granted |
| | 21 | JUDGMENT |
| | 22 | NOTICE TO COUNSEL w/order CLOSED |
| 10/31/83 | | REPORTER'S NOTES OF 9/23/83 (ANDERSON-R; Box 83-4) RE: Deft's motion for sum. judgt. |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| 11/23/83 | 23 | NOTICE OF APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS BY PLTFF. FROM JUDGMENT (Magnuson-J; 10/6/83) Copies to counsel. |

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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83-2582

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FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**RELEVANT DOCKET ENTRIES**

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 11/30/83 | 1 | Docketed case |
| 11/30/83 | | Certified copies notice of appeal; docket entries; judgment |
| 11/30/83 | | TO SETTLEMENT CONFERENCE |
| 11/30/83 | | BRIEFING SCHEDULE Applnt DR 12/5/83; DR Aplee 12/20/83; Clerks Record 12/30/83; Appdx 1/9/84; TR 12/30/83; Brief Applnt 1/9/84; Brief Appellee 2/8/84 |
| 12/9/83 | 2 | APPEARANCE FOR APPELLEE |
| 12/5/83 | 3 | APPEARANCE FOR APPELLANT |
| 1/3/84 | 4 | APPENDIX: w/ser 12/29 4 copies |
| 1/3/84 | 5 | BRIEF APPELLANT: w/ser 12/29 7 copies |
| 1/11/84 | 6 | Consent of U.S. to Clover Potter filing amicus brief |
| 1/11/84 | 7 | Consent of Appellant to Clover Potter filing amicus brief |
| 1/11/84 | 8 | AMICUS BRIEF: (Clover Potter) w/ser 1/9 7 copies |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1/11/84 | 9 | MOTION amicus requesting time for oral argument |
| 1/11/84 | 10 | MEMORANDUM in support of motion requesting time for oral argument |
| 1/11/84 | 11 | ORDER: ruling on motion of amicus to participate in oral arguments is deferred. Motion will be presented to panel assigned for hearing and disposition |
| 2/6/84 | 12 | MOTION appellee for extension of time to file brief GRANTED IN PART to February 22, 1984 on 2/6/84 |
| 2/22/84 | 13 | MOTION appellee for extension of time to file brief—GRANTED to March 2, 1984 on 2/23/84 |
| 3/5/84 | 14 | MOTION appellee for extension of time to file brief—GRANTED to March 7, 1984 on 3/5/84 |
| 3/8/84 | 15 | BRIEF APPELLEE: w/ser 3/7 7 copies |
| 3/13/84 | | To Screening 15 min. |
| 5/24/84 | | Transferred to June session. |
| 6/7/84 | 16 | ORDER: Motion by the Native American Rights Fund in behalf of amicus Clover Potter for leave to participate in oral argument is granted. Amicus shall be granted five minutes argument, without rebuttal. |
| 6/11/84 | | ARGUED AND SUBMITTED BEFORE JUDGES HEANEY, JOHN GIBSON AND FAGG IN ST. PAUL. Derck Amerman for aplnt. Kim Jerome Gottschalk (Amicus) J. Carol Williams (DOJ) for aple. Rebuttal by Amerman. Recorded |
| 1/18/85 | 17 | OPINION BY HEANEY PUBLISHED 753 F.2d 71 85 |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1/18/85 | 18 | Judgment of Dist. Ct. reversed and cause remanded for further proceedings in accordance with opinion. |
| 1/25/85 | 19 | MOTION APPELLEE EXTENSION OF TIME TO FILE PETITION FOR REHEARING. w/service. |
| 1/30/85 | 20 | APPELLANTS' BILL OF COSTS w/service. |
| 2/12/85 | 21 | ORDER: Motion of the appellee for an extension of time to and including February 22, 1985 to file petition for rehearing is granted. |
| 2/22/85 | 22 | PETITION APPELLEE FOR REHEARING WITH SUGGESTION OF REHEARING EN BANC CONSIDERATION. w. service. |
| 3/18/85 | | Received copy of additional citations from counsel for appellee. (O.K. per L.P.)—TO COURT. |
| 4/3/85 | 23 | Appellants' response to appellee's petition for rehearing en banc. w/service. |
| 4/4/85 | 24 | MEMORANDUM OF Clover Potter in support of opposition to petition for rehearing w/service. |
| 4/29/85 | 25 | ORDER: Appellee's petition for rehearing en banc has been considered by the Court and is denied. Petition for rehearing by the panel is also denied. |
| 5/21/85 | | MANDATE ISSUED. |
| 5/28/85 | 26 | RECEIPT FOR MANDATE. |
| 7/26/85 | | Received notification that extension of time was granted in which to file petition for writ of certiorari until 9/26/85. |
| 10/14/85 | 27 | NOTICE OF FILING of petition for writ of certiorari to Supreme Court as Case No. 85-546, dated September 26, 1985. |



UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

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3-81-1098

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FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

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**COMPLA'NT—CLASS ACTION**

Plaintiff Florence Blacketter Mottaz, an American Indian presently residing in the County of Anoka, State of Minnesota, on behalf of herself and all other American Indians, their heirs or assigns similarly situated, states and alleges:

I.

That the above Court has jurisdiction and this action is brought pursuant to 28 U.S.C. § 2415, § 1353, § 1331, § 1346 and 25 U.S.C. § 345 and the Fifth Amendment to the Constitution of the United States.

II.

That plaintiff Florence Blacketter Mottaz is a descendant and heir of the following original allottees who were granted the land described by the United States of America and which land was held in trust for the original allottees, their descendants, heirs and assigns:

Mary Knickerbocker, LL855 (Leech Lake)
N1/2NE1/4, Section 21, Township 145, Range 29,
County of Cass, State of Minnesota

David Knickerbocker, LL856 (Leech Lake)
NE1/4NW1/4, NW1/4SW1/4, Section 21, Township 145, Range 29, County of Cass, State of Minnesota

Esther Taylor, LL857 (Leech Lake)
SE1/4NW1/4, SW1/4NE1/4, Section 15, Township 141, Range 30, County of Cass, State of Minnesota

III.

That the above three parcels of land were sold or transferred by the defendant in 1954 as more particularly itemized in Exhibit A attached hereto and incorporated herein.

IV.

That said sales were made without the consent or permission of plaintiff Florence Blacketter Mottaz and were, therefore, illegal sales and transfers and are void.

V.

That Exhibit A attached hereto and incorporated herein outlines numerous other illegal and void sales and transfers of land made by the defendant of the land belonging to descendants, heirs and assigns of other original allottees in what is commonly described as the Leech Lake area located in the County of Cass, State of Minnesota and that this action is brought in behalf of those descendants, heirs and assigns of the original allottees as designated in said Exhibit and any other descendants, heirs and assigns not specifically referred to in Exhibit A located in the Leech Lake area.

VI.

This action is also brought in behalf of all the American Indian allottees, their descendants, heirs and assigns which were the victims of illegal and void sales and transfers made without their consent of land located in the state of Minnesota.



VII.

This action is also brought in behalf of all the American Indian allottees, their descendants, heirs and assigns which were the victims of illegal and void sales and transfers made without their consent of land located in the United States of America.

VIII.

Plaintiff Florence Blacketter Mottaz brings this action on her own behalf and as representative of a class as defined in Rule 23, Federal Rules of Civil Procedure. The class consists of all American Indians, their descendants, heirs or assigns from the original allottees of land granted to said allottees and held in trust for them by the United States of America located in County of Cass, State of Minnesota, the State of Minnesota and the United States of America, which land was transferred by defendant without their consent. That the class is so numerous that joinder of all members is impracticable. That there are questions of law or fact common to the class. That the claims of the representative parties are typical of the claims of the class and that the representative parties will fairly and adequately protect the interests of the class.

A. The prosecution of separate actions by individual members of the class would create a risk of:

1) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class;
2) Adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
3) The party opposing the class has acted or refused to act on grounds generally applicable to the class,

thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

4) The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

IX.

That defendant, its agents and employees breached their fiduciary duties and obligations when they transferred the land held in trust for the individual allottees, their descendants, heirs and assigns without obtaining the consent of said parties to said sales or transfers.

X.

Allege in the alternative that defendant, its agents and employees were negligent in the transfer or sale of said lands without obtaining the consent of the descendants, heirs or assigns of the original allottees herein.

XI.

Further allege that plaintiffs were deprived of property without due process of law and that their property was taken for public use without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, plaintiffs pray judgment against defendant for the following:

1. Damages in a monetary sum equal to the current fair market value of each parcel illegally transferred or in the alternative for rescission of the illegal sale or transfer and the vesting of title of each individual parcel in the names of the appropriate descendants, heirs and assigns.

2. Reasonable attorney fees and costs incurred herein.



3. Interest and costs and disbursements incurred herein.

/s/ DERCK AMERMAN

Derck Amerman
*Attorney for Plaintiffs*
*2408 Central Avenue N.E.*
*Minneapolis, MN 55418*
*789-8805*

DATED: DECEMBER 30, 1981.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-81-1098

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

**PARTIAL DISMISSAL**

That portion of the ad damnum clause of plaintiff's Complaint requesting rescission of the illegal sales or transfers and the vesting of title of each individual parcel in the names of the appropriate descendants, heirs and assigns, is hereby dismissed without prejudice.

/s/ DERCK AMERMAN

Derck Amerman
*Attorney for Plaintiffs*
*2408 Central Avenue N.E.*
*Minneapolis, MN 55418*
*789-8805*

DATED: JUNE 16, 1982.



UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File No. 3-81-1098

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

**STIPULATED FACTS**

On December 5, 1905, three Chippewa Indian ancestors of Florence Blacketter Mottaz received land allotments on the Leech Lake Reservation in Cass County, Minnesota pursuant to the General Allotment Act of February 8, 1887, 24 Stat. 388, 28 U.S.C., §§ 331 *et seq.*, and the Nelson Act of January 14, 1889, 25 Stat. 642. Those ancestors were Florence Blacketter Mottaz's mother, Esther Taylor, aka Esther Grasshopper, Florence Blacketter Mottaz's maternal aunt, Mary Knickerbocker, and the latter's son, David Knickerbocker. Their Leech Lake allotment numbers were 857, 855 and 856, respectively. The size of the three allotments was 80 acres each. Title to their allotments was held in trust by the United States for periods which were eventually extended indefinitely. Each lot was sold in 1954 to the United States Forest Service and is now included in that area known as the Chippewa National Forest. Each lot was sold with the express consent of some but not all of the heirs.

Respectfully submitted,

JAMES M. ROSENBAUM
*United States Attorney*

FRANCIS X. HERMANN
*Assistant United States Attorney*
*596 U.S. Courthouse*
*110 South Fourth Street*
*Minneapolis, Minnesota*
*55401*
*(612) 332-8961*

LARRY MARTIN CORCORAN
*Attorney, Department of Justice*
*Land and Natural Resources Division*
*Benjamin Franklin Station*
*P.O. Box 7415*
*Washington, D.C.*
*20044-7415*
*(202) 633-2305*

*Attorneys for Defendant*

*OF COUNSEL:*

MARIANA R. SHULSTAD
*Department of the Interior*
*Office of the Field Solicitor*
*Twin Cities, Minnesota*
*55111*

DERCK AMERMAN
LEONARD A. ZOLNA, JR.
*2408 Central Avenue N.E.*
*Minneapolis, Minnesota*
*55418*
*(612) 789-8805*

*Attorneys for Plaintiffs*

DATED: SEPTEMBER [*], 1983

[FILED: SEPTEMBER 21, 1983]

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* illegible



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
Consolidated Chippewa Agency
Cass Lake, Minnesota

April 30, 1953

Florence Blackketter Mattoz [*sic*]
1425 Ruth
St. Paul, Minnesota

Re: Allotment No. LL-855, Mary Knickerbocker
LL-856, David Knickerbocker

Dear Madam:

We are enclosing a corrected form, "Consent to Sale of Inherited Lands" covering lands in the above allotment, to replace the one sent to you recently.

As stated before, some of the owners have requested the sale of this land. Both land and timber, if any, have been appraised; and as soon as we get the consent to sell, an effort will be made to obtain a buyer by advertising for sale bids. This land will not be sold unless the high bid is equal to, or more than, the appraised value. If no reply is received from you within ten (10) days, it will be assumed that you have no objection to the sale.

Regulations now permit the sale of Indian land, and we believe it is an opportune time to sell due to economic conditions and before heirships become further complicated. If you know of anyone who might be interested in purchasing this land, we would appreciate your giving us the names and addresses of such persons.

If you are in favor of selling, be sure to sign each copy of the enclosed Consent in ink on the line immediately above your typed name. If thumb print is used, this should be done in the presence of two witnesses who will sign their names on the lines at the left-hand side of the page. Return

EXHIBIT 1

all copies to this office in the enclosed self-addressed envelope which requires no postage.

Sincerely,

/s/ J. W. KAUFFMAN
J. W. Kauffman
*Superintendent*



May 17, 1967

Mrs. Florence B. Mottaz
215½ Third Street
Bemidji, Minnesota 56601

Dear Mrs. Mottaz:

Reference is made to your visit to this office on May 12 regarding your desire to sell all of your inherited land interests, including Wisconsin, to the Tribe, except for FDL 140 which you state the heirs wish to retain.

According to our records you hold an undivided 1/15 interest each in FDL 139 and NL 48 (Minnesota) and an undivided 1/10 interest in BR 21 (Wisconsin).

We are enclosing applications for negotiated sale to the Minnesota Chippewa Tribe of your undivided interests in FDL 139 and NL 48. Please complete the applications in detail, sign where indicated, and return them to this office. We will then take the matter up with the Tribal Executive Committee at their next regular meeting in June, and will advise you as to what action they take.

As to BR 21 (Wisconsin), we are enclosing an application for negotiated sale of your undivided 1/10 interest. Please complete the application in detail, sign where indicated, and forward same to the Great Lakes Agency, Ashland, Wisconsin, which is the agency that has jurisdiction over this land.

We trust this is satisfactory.

Sincerely yours,
/s/ F. W. LEAF
*Realty Officer*

Enclosures 3
cc: Great Lakes Agency (Realty)
Realty: HJSchei 5-17-67

DEFENSE EXHIBIT "A.8"

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAY 31, 1979

Memorandum

To: Solicitor
Assistant Secretary—Indian Affairs
From: Associate Solicitor, Indian Affairs
Subject: Numerous allotment transfers void due to administrative error

The Twin Cities Field Solicitor has called our attention to a serious problem involving conveyances of inherited allotments pursuant to the Act of May 14, 1948 (25 U.S.C. § 483) [hereinafter referred to as the 1948 Act]. The problem is potentially as troublesome as some of the eastern Indian land claims, as it involves over 500 conveyances in the Minnesota Agency alone and perhaps hundreds more elsewhere.

In short, the 1948 Act authorized the Secretary to approve real estate conveyances "upon application of the Indian owners" with respect to interests in land held by individual Indians on reservations of tribes organized under the Indian Reorganization Act of 1934. The problem is that between 1948 and 1958 BIA officials approved numerous conveyances of inherited allotments without the requisite consents of all the Indian land owners. This was done notwithstanding a June 24, 1955, Memorandum from the Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs advising that the interests of a non-consenting owner may not be sold by the Secretary. As a result, it appears that numerous transactions were entered into without the requisite authority and are

EXHIBIT 1



therefore void. See *Ewert* v. *Bluejacket,* 259 U.S. 159 (1922). Current holders of those 160-acre allotments include non-Indians, municipalities, Indian tribes, and federal agencies such as the U.S. Forest Service. Their titles now suffer from a severe cloud which is a direct result of unauthorized administrative action.

A further complication is that many of the heirs whose interests were transferred without their consent often did not receive much if any of the consideration paid for their interests because that money was used to pay off the debts of the deceased allottee, including state old age assistance claims contrary to the ruling in *Running Horse* v. *Udall,* 211 F.Supp. 586 (D.D.C. 1962). It should be noted, however, that this practice was endorsed by the Solicitor's Office on a number of occasions.

Evidently the BIA officials responsible for the conveyance approvals during this period were of the view that the 1948 Act merely reinstated a provision in section 1 of the Act of June 25, 1910, to the effect that if the Secretary decides that one or more of the heirs to an allotment is incompetent, "he may, in his discretion, cause such lands to be sold." 25 U.S.C. § 372. The Secretary's authority under that provision was nullified with respect to allotments on IRA reservations by section 4 of the IRA (25 U.S.C. § 464), which prohibits that approval of any conveyance or transfer of restricted Indian lands. The 1948 Act was intended to overcome that prohibition, but it did not merely reinstate the 1910 Act. Rather, it provided a new standard for the conveyances of allotments, namely that such conveyances be made only "upon the application of the Indian owner." A detailed discussion of the legal issues may be found in a March 7, 1978, Memorandum from the Twin Cities Field Solicitor (attached).

## OPTIONS

The first, and perhaps most obvious alternative, is to recommend to the Justice Department that suits in ejectment or to quiet title be filed on behalf of the beneficial owners of the allotments unlawfully conveyed. Such suits, insofar as they seek damages for unauthorized possession of the land prior to 1966, would be subject to the statute of limitations due to run on April 1, 1980. Unfortunately, this action would appear to put us in the position of suing innocent purchasers of Indian lands and their grantees as a direct result of BIA misfeassance. Furthermore, the beneficiaries of such lawsuits may be difficult to identify since the BIA may no longer have adequate records of the heirs to former allotments. And even if they can be identified, in cases where heirship is quite fractionated (a reason, we presume, for not obtaining consents to the conveyance in the first place) the benefit to the heirs from such a suit may be minimal. Where Indian tribes now possess the land, we are in a flat conflict of interest as trustee, and where some federal agency claims title to the land, no lawsuit can be filed at all.

Another alternative is for the BIA to take administrative action to cancel the patents unlawfully issued. Any persons adversely affected by this action could then seek APA review. This is the tentative recommendation of the Field Solicitor, and it certainly would be a more efficient procedure than filing quiet title suits.

The disadvantage to this option is that it provides no means of seeking trespass damages for pre-1966 unlawful possession. Hence, this option is available both before and after April 1, 1980.

A third option is to seek legislation which would resolve this very sticky problem. Of course, to so state begs the question of what the legislation might provide for. One solution—and there may be many—would be to ratify all transfers of allotments which resulted from such BIA



error, and then to provide for an administrative claims procedure under which the former beneficial owners of the allotments could seek remuneration from the United States for the fair market value of their interest in the property at the time of the transaction, plus 6% simple interest since the date of the transaction, minus any consideration which the Indian owner may have actually received at the time of the transaction. Perhaps we could limit such claims to persons who *did not* consent to the transactions as required by the 1948 Act. Indeed, the transfer of the undivided interests of consenting owners may have been entirely valid, notwithstanding the fact that other owners of the same allotment may not have consented. Such legislation might also provide that the BIA has an affirmative duty to seek out all such beneficial owners and provide them with notice of such a claims procedure.

An obvious disadvantage to this solution is that it will cost the United States Government some fair amount of money. The actual amount for which the U.S. might be liable cannot yet be determined because we do not know how extensive this unauthorized administrative practice was outside of the Minneapolis Area. We are trying to get that information at this time. See attached memorandum of February 16, 1979.

We may also be criticized for proposing such a solution because we are seeking only money rather than land for the beneficial Indian owners, and this is contrary to our general policy of trying to provide some more permanent benefits to our Indian wards. The question might also be raised why we have not endorsed such a ratification procedure in the case of the eastern Indian land claims. The difference between the eastern claims and this problem is a significant one, however. In the case of the eastern claims there was no actual misfeasance or fault on the part of the United States except that Congress and the executive

branch as a whole appeared to have disregarded Indian land transactions on the east coast. In contrast, this problem involves affirmative administrative action taken without sufficient statutory authority therefor.

Also, in many of these cases the Indian people have not been asserting these claims on their own. Rather, we have discovered the clouds on the titles to these lands as a result of our search of BIA files as part of our general statute of limitations effort. Perhaps most of the beneficial owners of these allotments would be satisfied with cash remuneration since they are not now seeking a return on those lands or the lands of their ancestors. On the other hand, in some areas Indian claimants appear to be organizing to assert claims to the land itself. At any rate, any legislative solution will undoubtedly be both expensive and controversial.

We look forward to your guidance on this most difficult problem.

THOMAS W. FREDERICKS

Attachment



MARCH 15, 1978

Real Prop. Mgmt.

Memorandum

To: Assistant Secretary of the Interior
Attention: Office of Trust Responsibilities

From: Office of the Area Director

Subject: Sale of Indian Allotments without Consent

The attached memorandum dated March 7, 1978, to the Associate Solicitor from the Field Solicitor raises a number of questions concerning the sale or transfer of property in the Minneapolis Area during the 1950's. We have additional questions concerning the history of the practice of using the Secretarial Order Transferring Inherited Interests procedure and the substantiation used in approval of the earliest cases we have been able to locate in our records.

Some research at this office has disclosed that the procedure was used as early as April 8, 1948, when a 1/3 undivided interest was conveyed by heirs in Leech Lake Reservation Allotment No. 1422 and approved by the Assistant Commissioner of Indian Affairs. The conveyance was made to trust status for the Minnesota Chippewa Tribe as were eight other tracts conveyed to trust status during 1948. In 1950 and early 1951, several conveyances were similarly made but to trust for individuals on the Oneida Reservation, Leech Lake and one at Fond du Lac. From October 1951 through March of 1954, sixty-seven conveyances were made by Order Transferring Inherited Interests on Mille Lacs Reservation tracts to trust for the Minnesota Chippewa Tribe and several more similarly on Nett Lake allotments. In July 1954 the Orders Transferring Inherited Interests were utilized to convey Leech Lake allotments to the United States of America as a common procedure as

EXHIBIT 2

shown on pages 4 and 5 of the attached list. (Three allotments were conveyed in July 1953). We note in the 1948–1950 period the conveyances were surnamed by Rex Barnes and B. O. Angel who at that time was the Hearings Examiner and Field Solicitor.

More research will be necessary to list all the tracts conveyed by Orders Transferring Inherited Interests as recorded in our Deed Volumes. Those conveyed by issuance of fee patent are also of concern and will be more difficult to list completely since they will have to be segregated by those having full consents etc.

The Field Solicitor memorandum states that the figure of 2000 tracts is even greater on the reservation in Wisconsin and Michigan. This is extremely doubtful since the Chippewa Reservations were all allotted by restricted fee patent and all sales were made by deed. Where trust patents were issued on Public Domain and Homestead Allotments fee patents were issued in cases without full consent of owners but Section 8 of the Act of June 18, 1934 excludes those from the provisions of the Indian Reorganization Act.

Your assistance in determining the extent of the entire problem and appropriate resolution of it are vitally needed. The issue will undoubtedly raise a vast number of clouded title cases of a complex nature.

As we prepare additional lists of tracts involved in questionable conveyances copies will be furnished.

Acting Area Director

Attachments



EXHIBIT 3

March 7, 1978

Memorandum

To: Solicitor, Washington, D.C.
Attention Associate Solicitor, Indian Affairs

From: Field Solicitor, Twin Cities, MN

Subject: Sale of Indian Allotments without Consent

In reviewing many of the allotment files at the Minnesota Agency, Bemidji, it recently became apparent that great numbers of allotments were sold during the 1950's. In checking further on some of these sales, it seems that many were made with only partial consent of the heirs of the original allottees, and some were made with no consent whatsoever. The documents from three representative sales are enclosed for your information, and the Agency Realty Officer has begun a systematic review of the files. He estimates, from his initial stages of review, that upwards of 2,000 parcels of land were sold during that period with less than full consent of the beneficiaries and in questionable circumstances. If there were 2,000 of such sales on the six Minnesota Chippewa Tribe reservations alone, it is likely that the figure is even greater on the reservations under the jurisdiction of the Great Lakes Agency and the Michigan Agency.

With regard to the sales of Minnesota Chippewa Allotments, the allotments in question were trust allotments and were made pursuant to the General Allotment Act of February 8, 1887, 24 Stat. 338, and the Nelson Act of January 14, 1889, 25 Stat. 642, though some few allotments on the Fond du Lac and Grand Portage Reservations were made previously under the Treaty of September 30, 1854, and were in restricted status. The allotments were either not made until after 1909 or were extended at

some point by Executive Order, and were then extended indefinitely when all six reservations voted to accept the provisions of the Indian Reorganization Act of June 18, 1934, 43 Stat. 985, Section 4, 25 U.S.C. § 464, provides:

> Except as provided in sections 461, 462, 463, 464, 465, 466, 470, 471, 473, 474, 475, 476, 478, and 479 of this title, no sale, . . . or other transfer of restricted Indian lands . . . shall be made or approved *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located. . . .

The extent to which the above section is applicable to trust alloted lands on reservations where the Indian Reorganization Act was adopted does not appear to have been judicially determined, though the Solicitor spoke to the question in *Scope of the Secretary's Authority Under the Act of May 14, 1948,* M-36003, June 7, 1950, as follows:

> This prohibition applies to all "restricted Indian lands," including trust lands, [See Estate of Ke to sah Jefferson, IA 19, May 4, 1950,] held by individual Indians who are members of tribes that brought themselves within the compass of the 1934 act. [See Solicitor's memorandum of November 20, 1934, to Commissioner of Indian Affairs.] Thus, all such lands are "held under," or subject to, the provisions of the 1934 act.

The above interpretation seems consistent with the interpretation placed on Section 4 of the I.R.A. by the Bureau of Indian Affairs during the balance of the 1930's and the 1940's, since no allotted lands appear to have been sold on I.R.A. reservations during that period except in accordance with that section. However, with the passage of the Act of May 14, 1948, 62 Stat. 236, 25 U.S.C. § 483, the interpretation appears to be, at least with respect to sales of



alloted lands, that the provisions of Section 4 of the I.R.A. were repealed. The 1948 act provides:

> The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances.

The only reported decision on this question, though only a brief Per Curiam opinion on unstated facts, seems to support this interpretation. *Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *McKay,* 221 F.2d 336 (D.C. Cir. 1955), states cryptically,

> We agree with the District Court that the Act of May 14, 1948, 62 Stat. 236, 25 U.S.C.A. § 483, released certain Indian lands in Wisconsin, including those here involved, from prohibitions against sale or transfer imposed by the Act of June 13, 1934, 48 Stat. 935, § 4, 25 U.S.C.A. § 464.

Apart from the plain language of the 1948 act, if it were true that it simply repealed restrictions on sale or transfer of allotted lands imposed by Section 4 of the I.R.A., it would also, in turn, reinstate the act of June 25, 1910, 48 Stat. 647, 25 U.S.C. § 372, which provided in part,

> If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent, if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: . . . *Provided,* That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent as their respective interests may appear. . . .

The statute specifically requires a finding, prior to effectuation of the sale of allotted lands, that one or more of the heirs are incompetent. It does not, however, speak to the question of whether or not all heirs must consent to the sale. As recently as June 15, 1971, a fairly comprehensive legal memorandum was prepared by your office in connection with an appeal of Mrs. Cynthia Midthun for sale of Fort Peck Allotment No. 1279, a copy of which is attached for your ready reference. It initially correctly points out that one or more of the heirs must be found incompetent before the Secretary has authority to sell the land, and then proceeds to discuss the various Solicitor's Opinions which hold that sales may be made with less than full consent, being a memorandum of August 14, 1937, an opinion entitled *Authority of Commissioner of the General Land Office to Issue Patents in Fee Covering Indian Allotments with Reservations of the Minerals Underlying the Allotments in Favor of Indian Owners,* M-33967, 59 I.D. 109 (August 29, 1945); a footnote in an opinion on another subject, entitled *Patents in Fee,* M-36134, 61 I.D. 398 (February 15, 1954), and a questionable reference in an opinion entitled *Consent of Indians for Sale of Allotted Timber,* M-36477, 65 I.D. 101 (March 5, 1958). The 1971 opinion concludes,

> I have found no case law dealing with the specific question of whether sales by the Secretary under 25 U.S.C. § 372 require consent of all the owners. However, the statute on its face does not require such consent and the legislative history is at best, inconclusive. Bureau policy has authorized such sales for many years and we have previous Solicitor's opinions which support the concept that consent is not required. An argument could be made that the Bureau's policy under 54 IAM 2.2.3A(1) suffers from ambiguity and thus increases the possibility of nonuniform application of the policy to individual cases, which may cause a court to strike down this administrative practice. 2 Am. Jur. 2d *Administrative Law* §§ 240 250 (1962). However, there seems to be sufficient authority to sustain the Bureau's present policy of allowing sale of inherited lands without the consent of some of the owners as long as the conditions mentioned in 54 IAM 2.2.3A(1) are present.



The opinion does, however, recognize, on page 3, that the question is being answered only with reference to reservations not under the Indian Reorganization Act.

Again assuming that the 1948 act reinstated full application of the 1910 act, and assuming that the various Solicitor's Office opinions are correct in that consents from all heirs are not necessary prior to sale, many of the sales which took place on the reservations of the Minnesota Chippewa Tribe did not even meet the minimal requirements of the 1910 act. Of the three examples enclosed, the only mention made of incompetency is contained in the letter from the Superintendent to the Area Director recommending approval of the sale, and that is contained only in the files on Fond du Lac #14B and Fond du Lac #1d. No mention whatsoever of incompetency is made in the file on Leech Lake #15. In the letter relating to Fond du Lac #14B, the Superintendent states that, of the 46 heirs, 17 consented, 15 failed to reply to his inquiry, addresses were unknown for 10 of the heirs, 3 were deceased, and 1 was insane. No supporting documentation whatsoever is provided concerning the insanity. In the letter on Fond du Lac #1d, the Superintendent states that, of the 41 heirs, 31 consented, 4 were deceased and 6 failed to reply, though the letter goes on to state that 2 of the 6 who did not reply objected to the proposed sale in writing. He then goes on to note that a number were incompetent, naming 2 and stating that 5 others were minors, though presumably these 7 were among those who consented, and again, there is no supporting documentation. Of the 5 heirs to Leech

Lake #15, none consented and one of these voiced oral objections to the sale. Here there was no statement that any of the 5 was incompetent.

It does not, however, appear to be a reasonable interpretation of the 1948 act to hold that it merely repealed Section 4 of the Indian Reorganization Act, reinstating the authority of the Secretary under the 1910 act. The language of the 1948 act specifically states that the Secretary is authorized to issue patents and approve conveyances "upon application of the Indian owners." This imposes an additional condition upon the existence of Secretarial authority to sell, issue patents or approve conveyances, which condition was not specifically contained in the 1910 act. The fact that application or consent of the Indian owners is required for sale of an allotment subject to the provisions of the I.R.A. and the 1948 act would seem to parallel the requirement of participation by heirs to sell timber, under the provisions of the act of June 25, 1910, 36 Stat. 857, 25 U.S.C. § 406. While the precise language of the statute is a bit different, it likewise does not specifically say that *all* heirs or trust beneficiaries must consent prior to a sale of timber from the allotment, but, nevertheless, the Solicitor, in *Consent of Indians for Sale of Allotted Timber, supra,* held,

> There are numerous acts of Congress delegating broad powers of discretion to the Secretary with respect to selling, leasing, or granting easements or other interests in Indian lands or disposing of the products thereof, or approving such actions by Indian restricted owners, but unless the statute specifically empowers the Secretary to act without the consent or approval, express or implied, of all co-owners, as in the partition statutes to which you refer (acts of June 25, 1910 (36 Stat. 855), and May 18, 1916 (39 Stat. 127), as amended, 25 U.S.C. secs. 372 and 378), he has been reluctant to face possible litigation from a



> hostile minority ownership, even if the transaction appears in the best interests of all co-owners.
>
> In conclusion, in view of the provisions of the 1910 act, supra, [25 U.S.C. § 406] the Secretary should approve no sale of timber on allotted Indian lands without the consent, express or implied, *of all owners thereof,* . . . (Emphasis added)

An even stronger analogy exists to the interpretations placed on Section 6 of the General Allotment Act of February 8, 1887, 24 Stat. 390, 25 U.S.C. § 349, as amended by Act of May 8, 1906, 34 Stat. 182, which provides,

> [T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; . . .

Though there is a complete absence in the above language of any provision requiring application or consent by the allottee, it has been consistently held, not only by the Solicitor but also by judicial and Congressional interpretation, that application and consent is a vital prerequisite to issuance of a fee patent to the allottee.

During the period from approximately 1915 to 1921 or 1922, thousands of fee patents were issued to allottees around the country, all without application on the part of the allottee. Many were issued to heirs of a deceased allottee again without application. The Acts of February 26, 1927, 44 Stat. 1247, 25 U.S.C. § 352a, and February 21, 1931, 46 Stat. 1205, 25 U.S.C. § 352b, were passed specifically to alleviate the situation and authorized cancellation of fee patents issued without application or consent of the patentee. They were described thus, in

*Authority to Cancel Patent of Indian Allottee After Land is Incumbered by Lien*—Acts of February 26, 1927, and February 21, 1931, 54 I.D. 160, February 18, 1933;

> The object of both statutes, of course, was to correct or remedy the administrative error of casting the fee title upon the Indian without his application or consent, by authorizing the Secretary to cancel the patent so issued.

The language which the courts have applied in striking down patents issued to allottees and then heirs without application or consent is even more compelling when applied to sales without application or consent of heirs, particularly in light of the application requirement contained in the 1948 act, which does not appear in the General Allotment Act. Even so, the court in *United States* v. *Nez Perce County,* 16 F.Supp. 267 (D. Ida. 1936), *reversed on other grounds,* 95 F.2d 232 (9th Cir. 1938), held that "[t]he statute is clear that the consent and application must precede actual issuance of patent, and such consent must be positive and certain. See also, *United States* v. *Lewis County,* Idaho, 95 F.2d 236 (9th Cir. 1938); *Glacier County* v. *Frisbee,* 117 Mont. 578, 164 P.2d 171 (1945), *Iyall* v. *Yakima County,* 130 Wash. 537, 228 P. 513 (1924) *Bacher* v. *Patencio,* 232 F.Supp. 939 (D. Cal. 1964), *aff'd* 368 F.2d 1910 (9th Cir. __); and *United States* v. *Ferry County,* 24 F.Supp. 399 (D. Wash. 1938), which held,

> The Indians' vested right in this private property can only be divested by due process of law, it may not be impaired by legislative act, even when the Indian is a subject of guardianship, *Jones* v. *Meehan,* 175 U.S. 1, 20 S.Ct. 1, 44 L.Ed. 49 *Choate* v. *Trapp,* 224 U.S. 665, at page 677, 32 S.Ct. 565, 56 L.Ed. 941, supra. The Congress may remove restrictions to alienation with or without the consent of the allottees, *Williams* v. *Johnson,* 239 U.S. 414, 36 S.Ct. 150, 60 L.Ed. 358,



> but such is a clear distinction from depriving the allottees, without their consent, of the vested right to hold land free from taxation for 25 years, *U.S.* v. *Benewah County,* Idaho, 9 Cir., 290 F. 628, supra; *Choate* v. *Trapp,* . . . "it is noteworthy that, in other contemporaneous general provisions for granting Indian allottees patents in fee simple, it is expressly provided that such action might be had 'upon application' of the Indians."

The above quotation from *United States* v. *Ferry County, supra,* and *United States* v. *Benewah County, Idaho,* 290 F. 628 (9th Cir. 1928) could be equally applicable to sale of inherited interests without application or consent, for the interest of each heir is a vested right in private property which cannot be divested without due process of law. In fact, it is difficult to find a distinction between issuance of a fee patent to the heir of an allottee without his application and sale of the property of an heir of an allottee without his application. If anything, the latter is a more flagrant violation of due process, particularly in light of the specific requirement of application contained in the 1943 act.

Assuming that you concur in our ultimate conclusion that these sales, absent consent of all heirs, were unauthorized, the question remains as to how to deal with these cases. We would initially recommend that cancellation of the patents issued to purchasers be requested. There is some authority to the effect that notice to the current record title owner must be given of the intent to cancel such a patent. *Bisek* v. *Bellanger,* 5 F.2d 994 (D. Minn. 1925), states, "[t]here could be no cancellation without notice to the person actually interested and opportunity for a hearing in reference to the action proposed." Given such notice and hearing, any subsequent litigation could be in the form of Administrative Procedure Act review of agency action, rather than quiet title action by the United States

on behalf of the heirs of the allottee. This would seem the more logical approach, though could not be followed in all cases. The file on Leech Lake #15, which is enclosed, is representative of a sizeable percentage of less than full consent sales on the Leech Lake Reservation where the purchaser was the United States Forest Service. Administrative negotiation with the Department of Agriculture will be necessary to resolve these cases, and it is likely that similar sales to the Forest Service and other Federal agencies have taken place on other reservations, such as Lac Courte Oreilles and Lac du Flambeau in Wisconsin, where National Forests now include portions of Indian Reservations.

Similar to the situation where the United States Forest Service was purchaser of the allotted lands, there are cases of properties sold with less than full consent during the 1950s which have since been purchased by the United States in trust for the tribe or band. The Realty Officer of the Minnesota Agency has identified one such tract which has been purchased in fee by the Minnesota Chippewa Tribe subject to a substantial purchase money mortgage and on which the Tribe has constructed extensive improvements. Easiest to deal with will be those parcels sold to private parties which have passed to counties or states through tax forfeitures or other methods. The bulk of these cases, however, will undoubtedly consist of sales to private persons who have either retained the properties or sold them to other private interests.

Complicating each of these cases is the question of liability for damages. In each case the appraised value of the property was paid to the Bureau of Indian Affairs by the purchaser to whom the fee patent or deed was issued. One court has held that any refund of the purchase consideration must come from the beneficiaries who received the consideration initially. The court in *Siniscal* v. *United States,* 208 F.2d 406 (9th Cir. 1953), *cert. denied* 348 U.S. 813, 75 S.Ct. 29, 99 L.Ed. 645, stated,



> No portion of the public treasury may be used to refund the purchase price of lands subject to control of the United States where the purchase was set aside as having been made in violation of the applicable laws and regulations.

However, in many of the cases, the heirs of the original allottee received nothing or very little of the actual consideration paid for the lands, the proceeds instead being applied to claims against the estates of the allottee or previous beneficial owners or to state social security or Old Age Assistance claims. The file on the sale of Leech Lake Allotment #15 is an example of a case where the entire proceeds from sale were applied to an Old Age Assistance claim.

A number of Solicitor's Opinions uphold the practice of paying such claims from the proceeds accruing to an estate after the death of an allottee, even where the estate has been settled, and the property distributed to the heirs. *State Social Security Claims Against Restricted Indian Estates,* 61 I.D. 37, June 2, 1952, discusses a number of these and discards many of the arguments against such practice. The Solicitor said,

> The jurisdiction of the Secretary of the Interior over the trust or restricted estates of deceased Indians, including the determination of heirs and the approval of wills, is based upon sections 1 and 2 of the act of June 25, 1910, as amended (25 U.S.C., 1946 ed., accs. 372, 373). . . . the practice of considering and allowing claims against the estates of deceased allottees was almost immediately instituted.[1] [[1]See *Grace Cox et al.*, 42 I.D. 493, 501, 502 (1913), where it was said apropos of claims. "Claims for reasonable expenditures of this nature receive favorable consideration in this Office and are paid out of rentals or other funds remaining to the credit of the estate."]

The property of paying claims against the trust or restricted estates of Indians has been recognized in recent years by two Solicitors of the Department, who expressly stated that such claims might be paid not only from income to the credit of the estate at the time of the decedent's death but also from income accruing to the estate subsequent to the death of the decedent.[2] [[2]See letter dated June 20, 1949, from Solicitor Margold to the Solicitor of the Department of Agriculture, and letter dated September 23, 1944, from Solicitor Harper to Senator Harlan J. Bushfield of South Dakota.]

It is clear that the 1910 statute confers upon the Secretary of the Interior an implied power to allow claims against trust restricted Indian estates . . .

It might be contended that the departmental practice in the matter of allowing claims against trust or restricted Indian estates runs counter to the provision in section 5 of the General Allotment Act of February 3, 1887, (24 Stat. 389), as amended (25 U.S.C., 1946 ed., sec. 348), which states that at the expiration of the trust period of an allotment the United States will convey the same 'free of all charges or incumbrance whatsoever,' and to a related provision in the act of June 21, 1906 (34 Stat. 327, 25 U.S.C., 1946 ed., acc. 354), which states that no allotted land shall become 'liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.' Even conceding, for the sake of argument, that these provisions would preclude the allowance of claims against the estates of allotted Indians, it is clear that they have, in effect, been set aside by the later adoption of the act of June 25, 1910, which, properly construed, permits the allowance of such claims.

A directly contrary holding resulted from the appeal from an order of a Departmental Hearing Examiner allowing a



sizeable Old Age Assistance claim and directing payment from future income from the trust property devolving upon the heirs. The Ninth Circuit, in *Mary Hit Him Running Horse* v. *Udall,* 211 F.Supp. 536 (d, D.C. 1962), stated emphatically,

> Neither 25 U.S.C. § 372 nor 25 U.S.C. § 410 authorizes the defendant to direct payment of the debts of a deceased Indian out of the moneys accruing after death from trust lands in the hands of such decedent's Indian heirs.
>
> The action of the Secretary violates the statutory requirement that the trust property "shall not be liable to the satisfaction of any debt" contracted prior to the issuance of a patent in fee.
>
> Insofar as the opinion of defendant's Solicitor reported at 61 I.D. 37 (1952) is inconsistent herewith, that decision is erroneous.

In the only opinion which we have found since 1962 dealing with the subject, the Interior Board of Indian Appeals dismissed the decision *Running Horse* as being simply inapplicable, though the facts in that case, *Estate of Martin Spotted Horse, Sr. (Crow Allottee No. 3536, Deceased),* 2 IBIA 265, 81 I.D. 227, April 25, 1974, were vastly different from those in *Running Horse.*

We thus need three issues determined:

1. Whether or not sales of allotted lands on Indian Reorganization Act Reservations with less than full consent of the beneficial owners violated applicable statutes and regulations, and are void or voidable.

2. If either void or voidable, the proper procedure for recovering the lands or interests in lands. Determination should be made as to whether recovery can or should be made of the entire interest in such lands or only of those fractional shares held by heirs who did not consent to the sale.

3. The appropriate source for and measure of damages. If refund of consideration paid for purchase of the lands is to be derived from the beneficial owners at the time, further review and a definitive position must be taken on the payment of such funds to outside sources in satisfaction of claims against the estates of deceased Indians.

In light of the fact that vast numbers of these cases appear to exist and would require processing prior to the expiration of the statute of limitations at 28 U.S.C. § 2415, we would appreciate your expedited review of these problems. If you require further information, please ask and we will do everything possible to provide.

/s/ ELMER T. NITZSCHKE
*Field Solicitor*

Enclosures:
cc: Minneapolis Area Office, BIA, Mpls., MN,
Minnesota Agency, Bemidji, MN
Great Lakes Agency, Ashland, WI
Boston, MA



Real Prop. Mgmt. March 20, 1978

Memorandum

To: Assistant Secretary of the Interior
Attention: Office of Trust Responsibilities

From: Office of the Area Director

Subject: Sale of Indian Allotments Without Consent

Reference is made to one memorandum of March 15, 1978, regarding questions on the transfer of allotted interests in the Minneapolis Area by means of Secretarial Order Transferring Inherited Interests. Our deed files have been reviewed from the beginning of recordation in 1948 through 1961 and the attached list of transfers were recorded in that period.

There were 490 sales some representing two tracts of the same allotment. Nearly all were on the Leech Lake and Mille Lacs Reservations and we note that in 22 cases consents from all heirs were obtained. Each of the case files would have to be examined to determine that actual consents signed by heirs at the time.

There were also a fairly large number of cases of sale by issuance of patent in fee in which we also understand that they failed to obtain consents from all heirs. We will try to list these as well to determine the full extent of the conveyance procedures during that period.

/s/ BERNARD GRANUM
*Acting Area Director*

Attachment

cc: Minnesota Agency w/attachments
Field Solicitors Office w/attachments

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

To: Solicitor
Assistant Secretary, Indian Affairs

July 18,1979

From: Associate Solicitor, Indian Affairs

Subject: Allotment transfers void due to administrative error

In a May 31, 1979, memorandum I called your attention to a serious problem involving transfers of inherited allotments on IRA reservations without the consents of all the heirs, as is evidently required by 25 U.S.C. § 483. At that time we estimated that hundreds of transactions handled by the BIA between 1948 and 1958 were void, at least in part, because of the failure to obtain the requisite consents. Innocent landowners, including Indian tribes and individual Indians, now hold record title to many of those inherited allotments which suffer from a cloud on title as a result of the past administrative error.

Our worst fears have now been confirmed. The Minnesota Agency of the BIA has reported 619 such transfers. Hundreds more are expected to be reported from the Aberdeen and Billings Areas. Few, if any, such transfers are expected to be identified in the Southwest because of the relatively small-scale allotting there and the fact that most tribes in that area are non-IRA. Oklahoma and Alaska are not subject to the provisions of 25 U.S.C. § 483, and it appears that we do not have a serious problem in the Far West. But the problem in the Northern Great Plains is of significant magnitude.

Since virtually all of the nonconsenting heirs' claims are in part subject to the April 1, 1980, statute of limitations found at 28 U.S.C. § 2415, it is important that we address



this problem as soon as possible. I therefore recommend that we have a meeting at your earliest convenience. The May 31 memorandum should serve as a sufficient option paper for purposes of opening the meeting.

THOMAS W. FREDERICKS

CONSENT TO SALE OF INHERITED LANDS

WHEREAS, the undersigned, is the owner of an undivided 294/8820 interest in those certain lands described as NE¼NW½, NW¼SW¼ Sec. 21, T. 145 N, R. 29 W., 5th P.M., County of Cass, Minnesota which were allotted to David Knickerbocker deceased allottee No. 856 of the Leech Lake Reservation, and

WHEREAS, I have been advised that under authority of the Act of June 25, 1910 (36 Stat. 855) and other applicable provisions of law, the Secretary of the Interior or his duly authorized representative proposes to sell the above described land at the appraised value of $420.50, which is acceptable to me as adequate compensation for said lands;

NOW, THEREFORE, I hereby consent to the sale of said lands and request the Secretary of the Interior or his duly authorized representative to sell and convey all of my right, title and interest therein, subject to payment to me or deposit to my credit at the Consolidated Chippewa Agency, my proportionate share of the aggregate value of the said lands.

Dated this ____ day of _____, 19____.

Witnesses:

_____ X _____

Florence Blackketter Mattoz [*sic*]

_____ _____

EXHIBIT 4



CONSENT TO SALE OF INHERITED LANDS

WHEREAS, the undersigned, is the owner of an undivided 294/8820 interest in those certain lands described as N½NE¼ Sec. 21, T. 145 N, R. 29 W., 5th P.M., County of Cass, Minnesota which were allotted to Mary Knickerbocker deceased allottee No. 855 of the Leech Lake Reservation, and

WHEREAS, I have been advised that under authority of the Act of June 25, 1910 (36 Stat. 855) and other applicable provisions of law, the Secretary of the Interior or his duly authorized representative proposes to sell the above described land at the appraised value of $605.75, which is acceptable to me as adequate compensation for said lands;

NOW, THEREFORE, I hereby consent to the sale of said lands and request the Secretary of the Interior or his duly authorized representative to sell and convey all of my right, title and interest therein, subject to payment to me or deposit to my credit at the Consolidated Chippewa Agency, my proportionate share of the aggregate value of the said lands.

Dated this ____ day of _____, 19____.

Witnesses:

_____ X _____

Florence Blackketter Mattoz [*sic*]

_____ Address: _____

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
MINNESOTA AGENCY
P.O. Box 97
CASS LAKE, MINNESOTA 56633

December 8, 1981

Mr. Leonard A. Zolna, Jr.
Attorney at Law
8406 Laddie Road
Spring Lake Park, MN 55432

Dear Mr. Zolna:

The 2415 Land Claims Office has forwarded the results of their research to this office concerning the status of the lands interests of your client, Florence Blacketter Mottaz.

The following is a list of interests currently held in trust by your client.

Fond du Lac 139 N½SW¼ of Section 27, Township 49, Range 18, 80 acres Joe ah ke wainze, allottee. 1/15 undivided interest.

Fond du Lac 140 N½NE¼ of Section 29, Township 49, Range 18, 80 acres Ke we tah o say quay, allottee. 1/5 undivided interest plus 1/20 undivided interest by deed from Lucy Ashland LaRose.

Nett Lake 48 S½SW¼ of Section 32, Township 65, Range 22, 80 acres O gah bay cum ig oke, allottee. 1/15 undivided interest.

Bad River 21 (Wisconsin) E½NW¼ of Section 21, Township 48, Range 3, 80 acres William Rankin, allottee. 1/10 undivided interest.

Florence Mottaz inherited all of the above interests from her mother, Esther Taylor Grasshopper.

As was explained in your conversation with Lenee Ross, 2415 Land Claims Project Director, Leech Lake 855, 856

EXHIBIT 5



and 857 in which your client held a 7/210, 1/30 and 1/5 undivided interest respectively, were submitted as Secretarial Transfer cases where not all of the heirs conveyed their interests in an allotment. A legislative solution is currently being worked out for these cases. A copy of this report including the above allotments is enclosed.

Florence Mottaz held a total 1/15 undivided interest in the allotment of James Taylor, Sr., Leech Lake 1730. She signed a consent to the sale of that land to the Minnesota Chippewa Tribe on April 18, 1942. The copies of documents pertaining to that sale are also enclosed.

Mrs. Mottaz contends she never consented to sell her 1/5 interest in Fond du Lac 286. However, a letter dated January 4, 1955 from the Area Realty Officer suggests that she did receive payment. A copy of the letter is enclosed.

We hope this information has been of help to you. Should you have any questions, please feel free to contact this office.

Sincerely,

WAYNE ENQUIST
*Realty Officer*

LEONARD A. ZOLNA, JR.
ATTORNEY AT LAW
8406 LADDIE ROAD
SPRING LAKE PARK, MN 55432
Telephone (612) 786-4316

October 24, 1981

Bureau of Indian Affairs
Acting Superintendent
Mr. Steven Tibbetts
P.O. Box 97
Cass Lake, MINN 56633

Re: Real Property Mgmt. 1106-01 TRR 8-7

Dear Superintendent Tibbetts:

On August 5, 1981 I wrote you a letter requesting information on various pieces of property that Mrs. Florence Blacketter Mottaz had or has an interest. I did receive a letter from you concerning the Diamond Match Company sale of FDL 286 E 1/2 NE 1/4 Sec. 8-49-18. However, to date I have not received an updated list of all land interests held by Florence Blacketter Mottaz. I am still interested in obtaining this information for my client.

My client would also like further verification concerning the sale of Fond du Lac 286. She insists that she did not sign the Consent to Sale and I must admit that the copy you sent me does not have her signature nor any of the witnesses. Were the Consent to Sale forms required as a prerequisite to the sale or could property be sold without obtaining the signatures of all heirs?

My client has asked me to obtain any and all records, letters, vouchers, consent to sale, and any other type of document that the BIA has in it's possession concerning the following properties:

FDL 286





LL 855 N 1/2 NE 1/4 Sec. 21-145-29

LL 856 NW 1/4 SW 1/4 Sec. 21-145-29 NE 1/4 NW 1/4

LL 857 SE 1/4 NW 1/4 and SW 1/4 NE 1/4 Sec. 15-141-30

I would appreciate copies of all such documents and I have enclosed an authorization for release of this information to me from Mrs. Mottaz.

Thank you in advance for your consideration of this matter.

Sincerely,

LEONARD A. ZOLNA, JR.

# Supreme Court of the United States

No. 85-546

UNITED STATES, PETITIONER

*v.*

FLORENCE BLACKETTER MOTTAZ, ETC.

ORDER ALLOWING CERTIORARI. *Filed November 18, 1985.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Eighth Circuit* is granted.

No. 85-546

# In the Supreme Court of the United States

OCTOBER TERM, 1985

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UNITED STATES OF AMERICA, PETITIONER

*v.*

FLORENCE BLACKETTER MOTTAZ, ETC.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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CHARLES FRIED
*Solicitor General*

F. HENRY HABICHT II
*Assistant Attorney General*

LAWRENCE G. WALLACE
*Deputy Solicitor General*

EDWIN S. KNEEDLER
*Assistant to the Solicitor General*

DAVID C. SHILTON
J. CAROL WILLIAMS
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether either the twelve-year statute of limitations under the Quiet Title Act, 28 U.S.C. 2409a(f), or the six-year statute of limitations in 28 U.S.C. 2401(a) applicable to suits against the United States generally, bars this suit brought by an heir of an Indian allottee against the United States to recover land to which the United States acquired title in an allegedly unlawful transaction 27 years earlier, or to recover money damages in the amount of the current fair market value of the land.

## PARTIES TO THE PROCEEDING

The only parties to the proceeding are those listed in the caption. Respondent sought to represent a class of all similarly situated Indians residing in the United States (J.A. 9-10). However, the district court dismissed the suit on statute of limitations grounds, and it therefore did not certify a class.

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# In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-546

UNITED STATES OF AMERICA, PETITIONER

*v.*

FLORENCE BLACKETTER MOTTAZ, ETC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 753 F.2d 71, and the memorandum order of the district court (Pet. App. 9a-11a) is unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 12a) was entered on January 18, 1985, and a petition for rehearing was denied on April 29, 1985 (Pet. App. 13a). On July 22, 1985, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including September 26, 1985. The petition was filed on that date, and was granted on November 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTES INVOLVED

25 U.S.C. 345 and 483, and 28 U.S.C. 1353, 2401, 2501 and 2409a, are reproduced in relevant part at App., *infra*, 1a-4a.

## STATEMENT

1. On December 5, 1905, three Chippewa Indian ancestors of respondent Mottaz received allotments of land on the Leech Lake Reservation in Cass County, Minnesota, pursuant to the General Allotment Act of February 8, 1887, 25 U.S.C. 331 *et seq.*, and the Nelson Act of January 14, 1889, ch. 24, 25 Stat. 642 *et seq.* The allotments were held in trust by the United States for periods that eventually were extended indefinitely by Section 2 of the Indian Reorganization Act of 1934, 25 U.S.C. 462. Respondent inherited a one-fifth interest in one of the allotments and a one-thirtieth interest in each of the other two (Pet. App. 2a).

Under 25 U.S.C. 483, the Secretary of the Interior "is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians." In the early 1950s, some of the individuals who also owned fractional interests in the three allotments at issue in this case requested the Department of the Interior to sell the allotments. Pet. App. 2a. In May 1953, the Department's Office of Indian Affairs sent letters to respondent pertaining to each of these allotments, which read in part (*ibid.* (emphasis added)):

> Some of the owners have requested the sale of this land. We have appraised both land and timber, if any, and as soon as we get the consent to sell, an effort will be made to obtain a buyer by advertising for sale bids. This land will not be sold unless the high bid is equal to, or more than, the appraisal value. *If no reply is received from you within ten (10) days, it will be assumed that you have no objection to the sale.*



Respondent did not object to the sale of the allotments (Pet. App. 9a), although she also did not sign and return to the Office of Indian Affairs a form stating that she expressly consented to the sales (*id* at 3a).[1] The Interior Department accepted bids for the allotments, and in 1954, each allotment was sold to the United States Forest Service.[2] The tracts now are included in the Chippewa National Forest (*ibid.*).

In 1967, respondent visited the Bureau of Indian Affairs (BIA) and expressed a desire to sell all of her inherited land. In its written response to that visit, BIA identified the interests in allotments that respondent then held. BIA's response did not mention any interest in the three allotments at issue here. DX A8 (J.A. 17). In response to another inquiry in 1981, BIA again provided respondent with a list of all her current interests in allotments. BIA also stated that respondent once had held interests in the three allotments that were sold to the Forest Service in 1954. However, it informed her that those interests had been identified by BIA as so-called "Secretarial Transfer" cases, which referred to transactions in which not all of the heirs had consented to the conveyance of their interests in a particular allotment. PX 5 (J.A. 44-45). Respondent's interests apparently were so designated pursuant to a project the BIA had instituted in the late 1970s in order to

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[1] Some of the other owners of fractional interests in the allotments did give their express consent to the sales (Pet. App. 3a; see J.A. 13).

[2] Apparently the normal procedure was to distribute the proceeds of such a sale to the heirs who owned interests in the allotment (Pet. App. 9a)—unless, perhaps, there were claims against the allottee or previous beneficial owners to be settled out of the proceeds (J.A. 35). There is no allegation in the complaint in this case that such a distribution did not occur with respect to the three allotments at issue.

identify potential claims that might be affected by the statute of limitations in 28 U.S.C. 2415, a provision applicable, inter alia, to trespass damage actions brought by the United States on behalf of Indians. Pet. App. 3a. See generally *County of Oneida* v. *Oneida Indian Nation* (*Oneida II*), No. 83-1065 (Mar. 4, 1985), slip op. 14-16.[3]

[3] 28 U.S.C. 2415, which was originally enacted in 1966 (Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304 *et seq.*), imposes a statute of limitations on various actions brought by the United States generally, including those brought on behalf of Indians. Section 2415 originally imposed a six-year limitation on the United States' bringing of contract claims, a three-year limitation on tort claims, and a six-year limitation on trespass actions and certain other claims. Prior to 1982, the statute had been amended on a number of occasions to extend the limitations period for damage actions based on pre-1966 transactions affecting Indian lands. Act of July 18, 1972, Pub. L. No. 92-353, 86 Stat. 499 *et seq.*; Act of Aug. 15, 1977, Pub. L. No. 95-103, 91 Stat. 842 *et seq.*; Act of Mar. 27, 1980, Pub. L. No. 96-217, 94 Stat. 126 *et seq.*

In connection with the 1982 amendments to 28 U.S.C. 2415, the Secretary was required to prepare a list of Indian claims accruing prior to July 18, 1966, that were subject to the statute of limitations. Those claims that were listed are not barred by 28 U.S.C. 2415; those that were not listed became time-barred upon the passage of 60 days after the publication of the final list. Indian Claims Limitations Act of 1982, Pub. L. No. 97-394, 96 Stat. 1976 *et seq.*, 28 U.S.C. 2415 note. See *Oneida II*, slip op. 15. The legislative history of the 1982 amendments describes "Secretarial transfer" cases as trespass claims that resulted from the Secretary's sale of trust land in heirship status without the consent of all of the heirs. See H.R. Rep. 97-954, 97th Cong., 2d Sess. 7 (1982).

The three allotments on the Leech Lake Reservation in which respondent formerly owned an interest (Nos. 855, 856 and 857 (J.A. 7-8, 13)) are included on this list of claims prepared pursuant to the 1982 Act. 48 Fed. Reg. 13846 (1983). Although respondent's claims therefore are not barred by 28 U.S.C. 2415 and the Indian Claims Limitations Act of 1982 insofar as they might lie against anyone other than the United States as a result of the allegedly unlawful sale of her interests, her claims against the United States are not covered by those provisions. The latter claims instead are subject to the statutes of limitations in 28 U.S.C. 2401(a) and 2409a(f) that are applicable to suits against the United States. See Pet. App. 10a-11a.



2. On December 30, 1981, respondent filed this action in the United States District Court for the District of Minnesota (J.A. 1, 7-11). She alleged, inter alia, that the sales of the three allotments were made without her consent or permission and were, for that reason, "illegal and void" (J.A. 8); that the United States and its agents breached their fiduciary duties and were negligent in selling the land without obtaining her consent (J.A. 10); and that her property was taken for a public use without just compensation, in violation of the Fifth Amendment (J.A. 10). As relief, respondent sought damages in the amount of the current fair market value of each parcel or, in the alternative, rescission of the sales, with title to the allotments to revest in respondent and other descendents, heirs, and assigns of the original allottees (*ibid.*; Pet. App. 3a-4a).[4] Following a pretrial hearing on June 6, 1982, respondent dismissed without prejudice her demand for rescission of the sales and revesting of title in respondent and others (J.A. 12), leaving only her demand for damages (Pet. App. 4a).

On October 7, 1983, the district court granted the United States' motion for summary judgment, holding that this suit is barred by the statute of limita-

[4] Respondent also sought to represent a class of Indian allottees (and their descendents, heirs and assigns) of land previously held in trust anywhere in the United States that was transferred by the United States without their consent (J.A. 9).

tions in 28 U.S.C. 2401(a) (Pet. App. 9a-11a). Section 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." In this case, the court held that respondent's cause of action first accrued when she learned of the sales of the allotments. The court found that "[t]he deposition of the [respondent] clearly reveals that she had knowledge of the sale in 1954," and it concluded on this basis that the suit is time-barred under 28 U.S.C. 2401(a) (Pet. App. 10a).

The district court also rejected respondent's argument that the statute of limitations in 28 U.S.C. 2415 for trespass damage actions relating to Indian lands (see pages 3-4 & note 3, *supra*) overrides the six-year statute of limitations in 28 U.S.C. 2401(a). The court reasoned that "28 U.S.C. § 2415 applies to actions brought *on behalf of* a recognized tribe or individual Indian," not "claims *against* the United States," which are governed by 28 U.S.C. 2401(a). Pet. App. 10a-11a (emphasis in original).

3. The court of appeals reversed and remanded (Pet. App. 1a-8a). The court of appeals acknowledged that respondent had voluntarily dismissed her complaint insofar as it sought rescission of the sales and the revesting of title in respondent and others (*id.* at 4a), and that she now only "seeks to obtain damages for the government's alleged negligence and breach of fiduciary duty" (*id.* at 6a). But the court did not read this partial dismissal to constitute an abandonment of what it took to be the "gist" of respondent's complaint: that "the sale of her land was illegal and void and did not transfer title" (*id.* at 4a). Instead, the court believed that "[respondent's] claim for damages in the amount of the fair market value of the land must be construed as equivalent to a



claim for return of the land itself" (*id.* at 6a). The court believed "as a matter of policy" that because the parcels are incorporated in an inaccessible national forest where they have little value to respondent, she "may force the government to pay her the fair market value of the land rather than to simply return the land itself" (*id.* at 6a-7a, 8a).

In its brief discussion of the statute of limitations issue (Pet. App. 4a-6a), the court of appeals relied primarily on this Court's decision in *Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922). *Ewert* held that the state statute of limitations did not bar a suit by an Indian to recover land that was acquired by a non-Indian in violation of a federal statutory prohibition. The court of appeals acknowledged that the parties had not identified any case that considered whether *Ewert* also prevents the application to Indian land claims of federal statutes of limitations, such as the general statute of limitations in 28 U.S.C. 2401 for claims against the United States (Pet. App. 5a-6a). However, without discussion or citation to supporting authority, the court concluded that "Congress has not repudiated its policy of protecting Indian land by providing that claims against the United States for title to wrongfully alienated allotments are barred by a statute of limitations" (*id.* at 6a). Instead, the court read *Ewert* to stand for the proposition that if the underlying sale of land is void, "the concept that a cause of action 'accrues' at some point [for purposes of the statute of limitations in 28 U.S.C. 2401(a)] is inapplicable because the allottee simply retains title all along" (Pet. App. 6a).

In remanding the case for further proceedings (Pet. App. 7a-8a), the court held that respondent's failure to interpose an objection to the sale of the allotments in 1953 would not in itself constitute consent to the sale for purposes of 25 U.S.C. 483, but

that if respondent in fact received payment for her interests in the land in 1954, it "may be assumed that she consented to the sale and thus that she does not have a cause of action" (Pet. App. 7a). On the other hand, the court held that "[i]f the government did not pay [respondent], then it does not hold title to her allotments until she receives payment equal to the fair market value of the land" (*id.* at 7a-8a). The court acknowledged the government's argument that "the payment records may be difficult if not impossible to recover and that this is a good reason why a statute of limitations should bar [respondent's] claim" (*id.* at 7a n.8). Nevertheless, the court held that "[t]he government must bear the burden of proving that it paid [respondent] and therefore that it holds valid title to the [three] allotments" (*ibid.* (footnote omitted)).[5]

## SUMMARY OF ARGUMENT

### I.

The fundamental rule of sovereign immunity is that the United States cannot be sued without the consent of Congress. This rule applies to suits brought by Indians in the same manner as it applies to all others. When the legislation in which Congress consents to suit contains a statute of limitations, the limitations provision constitutes a condition on the waiver of

[5] The court left open for decision on remand the question whether 25 U.S.C. 483 prevented the Secretary from selling the allotments without respondent's consent (Pet. App. 7a). Although the court seemed to believe that this issue (and the question whether payment was made to respondent) bore on the application of the statute of limitations, they would appear to go to the merits of whether an unauthorized sale occurred in 1954 and whether the United States thereafter wrongfully withheld from respondent the proceeds of that sale.



sovereign immunity that must be strictly observed by the courts. Exceptions thereto are not to be implied. The court of appeals failed to respect these principles in this case.

### II.

Although the court of appeals believed that respondent still is asserting a claim of title to the three parcels of land in question, it failed to consider the application of the Quiet Title Act (QTA) and the 12-year statute of limitations for QTA suits. See 28 U.S.C. 2409a(f). The court of appeals did acknowledge that under 28 U.S.C. 2401(a), other civil actions brought against the United States in district court are barred unless the complaint is filed within six years of the date on which the right of action first "accrues." But the court nevertheless held that this suit, filed 27 years after the sale of the parcels, is not barred by 28 U.S.C. 2401(a).

The court of appeals held that where a suit is brought by an Indian claiming that a prior sale of his land was void, the concept that the cause of action "accrues" at some point is inapplicable because the allottee retains title all along. The only authority the court of appeals cited for this novel proposition, *Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922), lends it no support. The Court's holding in *Ewert* that the state statute of limitations did not bar the suit was based on the principle that under the Supremacy Clause, state-law time bars do not apply of their own force to Indian land title claims based on federal law. Moreover, the court of appeals' view that a cause of action based on a void transaction never "accrues" and therefore can never be time-barred is inconsistent with the function of a statute of limitations, which is to preclude a suit after passage of the specified period of time irrespective of the merits of the claim, and with the purpose of ensuring respose and

protecting the courts and defendants from the difficulties associated with the litigation of stale claims.

**III.**

Quite aside from the error in the court of appeals' rationale for avoiding the statute of limitations, this suit is barred irrespective of the manner in which it is characterized.

A. Although respondent voluntarily dismissed her demand for rescission of the 1954 sales and revesting of title in her, the court of appeals held that the gist of respondent's suit is that those sales were void and that she therefore retains title to her interests in the three parcels. For this reason, the court believed that her demand for a money judgment must be regarded as the equivalent of a demand for the return of the land itself. If the court of appeals is correct that respondent is disputing the United States' title to the three parcels, then this suit is governed by the QTA, because that Act is the exclusive means for adjudicating a disputed title to real property in which the United States claims an interest. *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983). That the QTA is exclusive as regards suits brought by Indians is evident from the fact that although Congress fashioned an exception from the QTA for suits involving trust or restricted Indian lands—*i.e.*, for situations in which Indian interests are aligned with those of the United States as the defendant—Congress did not include any comparable exception for cases involving an Indian plaintiff. Moreover, although Congress granted the United States the option of retaining the property if it pays compensation to a prevailing QTA plaintiff, Congress did not grant the plaintiff a similar option to demand a money judgment in lieu of the return of the property, as the court of appeals permitted in this case.



Because jurisdiction over this suit lies exclusively under the QTA insofar as respondent disputes the United States' title, it is time-barred by 28 U.S.C. 2409a(f), which requires that a QTA suit be brought within 12 years of the date on which it accrued. This limitation applies to "[a]ny civil action" brought under the QTA and contains no exception for suits brought by Indians. Section 2409a(f) provides that a cause of action "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." In this case, respondent knew of the sale of the property in 1954, far more than 12 years before this suit was filed, and her suit therefore is barred.

B. Respondent also has characterized her suit as one for money damages, based on an alleged breach of fiduciary duty by the United States in connection with the sale of her interests in 1954. Jurisdiction over such a suit would lie under the Tucker Act, 28 U.S.C. 1346(a)(2), but the district court now is barred from exercising that jurisdiction by the six-year statute of limitations in 28 U.S.C. 2401(a). With one exception not relevant here, Section 2401(a) applies to "every civil action" commenced against the United States in district court. The legislative history of the provision in 28 U.S.C. 1505 for Indian tribes to sue the United States, discussed by this Court in *United States* v. *Mitchell* (*Mitchell I*), 445 U.S. 535, 539 (1980), demonstrates that Congress intended Tucker Act suits brought by Indians to be subject to the same conditions to which such suits brought by other plaintiffs are subject, and the courts of appeals have not recognized any exception from the statute of limitations for Tucker Act suits brought by Indians.

C. Finally, respondent has characterized her suit as one for an allotment under 25 U.S.C. 345 and the

corresponding jurisdictional provision, 28 U.S.C. 1353. However, those provisions by their terms are limited to suits involving "the right of any person * * * to any allotment of land under any law or treaty"—*i.e.*, to suits for an "original allotment." F. Cohen, *Handbook of Federal Indian Law* 380 n.184 (1942). They do not authorize a suit to recover a parcel of land that previously was patented to an Indian in satisfaction of his right to an allotment and then later conveyed out of trust status.

This interpretation of the provisions now codified at 25 U.S.C. 345 and 28 U.S.C. 1353 is confirmed by the circumstances of the enactment of the former provision in 1894 and by the legislative history of each of four amending statutes enacted over the ensuing 17 years. This Court's decisions also make clear that these provisions "ha[ve] reference to original allotments claimed under some law or treaty, and not to disputes concerning the heirs of one who held a valid and unquestioned allotment" (*First Moon* v. *White Tail*, 270 U.S. 243, 245 (1926)), and that "Section 345 authorizes, and provides governmental consent for, only actions for allotment" (*Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 142 (1972)). Moreover, the QTA has now displaced any right of action that might once have been available under 25 U.S.C. 345 and 28 U.S.C. 1353 to contest the United States' title to formerly allotted land, and the Tucker Act is the exclusive jurisdictional basis for a damage action against the United States in connection with such land.

In any event, even if 25 U.S.C. 345 and 28 U.S.C. 1353 do confer jurisdiction on the district courts to entertain a suit such as this, respondent's suit nevertheless is barred by the six-year statute of limitations in 28 U.S.C. 2401(a), which applies to "every civil action" commenced against the United States in district court.



## ARGUMENT

### RESPONDENT'S SUIT AGAINST THE UNITED STATES BASED ON AN ALLEGEDLY ILLEGAL SALE OF HER UNDIVIDED FRACTIONAL INTERESTS IN THE ALLOTMENTS 27 YEARS BEFORE THIS SUIT WAS FILED IS BARRED BY THE STATUTE OF LIMITATIONS

#### I. ESTABLISHED PRINCIPLES OF SOVEREIGN IMMUNITY STRONGLY DISFAVOR IMPLIED EXCEPTIONS TO STATUTES OF LIMITATIONS THAT CONGRESS HAS IMPOSED AS CONDITIONS ON ITS CONSENT TO SUIT AGAINST THE UNITED STATES

Respondent knew in 1954 of the sale by the Secretary of her fractional interests in the three allotments, and the BIA's listing of her holdings in 1967 confirmed that the United States no longer held those interests in trust for her. The court of appeals nevertheless refused to find that this suit—which was filed in 1981, 27 years after the sale—is barred by the statute of limitations. This was error.

The principles that govern the statute of limitations issue in this case are firmly established. As the Court recently observed in another case involving a dispute over title to land, "[t]he basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). The Court there reiterated the rule that even "[t]he States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Id.* at 280. This principle applies equally to suits by Indians. See, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980).

"A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block* v. *North Dakota*, 461 U.S. at 287. "When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity" (*ibid.*) and " 'defines th[e] court's jurisdiction to entertain the suit.' " *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). See *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 233 (1887). See also *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). These principles weigh heavily against recognition of implied exceptions to the statute of limitations that Congress has imposed as a condition on its consent to suit against the United States. *Block* v. *North Dakota*, 461 U.S. at 287-288; *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957); *Kendall* v. *United States*, 107 U.S. 123, 125-126 (1882).

In this case, respondent alleges that the sale of her interests in the former allotments to the Forest Service was void and that she therefore retains title to those interests, and she seeks a money judgment in the amount of the current fair market value of her interests in lieu of the return of the land itself. This suit therefore is barred either by the statute of limitations under the Quiet Title Act (QTA), 28 U.S.C. 2409a(f), insofar as respondent seeks to establish her title to the allotments, or by the statute of limitations in 28 U.S.C. 2401(a), which is applicable to other suits brought against the United States in district court. The former provision states that "[a]ny civil action" brought under the QTA to adjudicate a disputed title to real property in which the United States claims an interest shall be barred unless it is commenced within twelve years of the date upon which it "accrued." 28 U.S.C. 2409a(f). The latter provision states that "every civil action" commenced against the United States in district court shall be barred unless the complaint is filed within six years after the right of action first "accrues." 28 U.S.C. 2401(a).[6]



The conclusion that this suit is barred by one or both of these federal statutes of limitations is compelled, we submit, by *Block* v. *North Dakota*, 461 U.S. at 287-290. There it was held that the broad language in the QTA imposing a statute of limitations on "[a]ny civil action," and the policies of repose reflected in that provision, require the application of the statutory bar to a suit brought by a State in the same manner as it is applied to suits brought against the United States by other persons. The same reasoning requires the application of the statutes of limitations in the QTA and 28 U.S.C. 2401(a) to those civil actions against the United States that are brought by Indians.

The court of appeals failed to respect these principles that govern conditions on the waiver of sovereign immunity, including statutes of limitations. In fact, it did not even discuss those principles. Instead, relying solely on *Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922), which held that a state statute of limitations did not bar a suit by an Indian against a pri-

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[6] Section 2401(a) contains an exception for suits covered by the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* See 41 U.S.C. 607(g)(1)(A), 609(a)(3). That exception has no application here.

vate party, the court of appeals held that the federal statutes of limitations applicable to all civil actions against the United States imposes no bar to this suit. As we demonstrate in Point II, *infra*, the court of appeals' reliance on *Ewert* for this unprecedented holding is completely without merit.

The court of appeals compounded its error by its failure even to identify the particular statute that it believed gave Congress's consent to suit in this case, by its evident confusion regarding the relief respondent seeks, and by its misunderstanding of the effect the nature of that relief has on the determination of which statute of limitations applies. But as we demonstrate in Point III, *infra*, this suit is barred by the statute of limitations irrespective of how it is characterized—whether as (a) an action to quiet title to respondent's interests in the former allotments that were sold to the United States Forest Service in 1954, (b) an action to recover damages for the allegedly illegal sales, or (c) a suit for an allotment.

## II. THE COURT OF APPEALS CLEARLY ERRED IN HOLDING THAT THIS COURT'S DECISION IN *EWERT* v. *BLUEJACKET* SUPPORTS THE CONCLUSION THAT RESPONDENT'S CAUSE OF ACTION HAS NOT "ACCRUED" FOR PURPOSES OF THE FEDERAL STATUTE OF LIMITATIONS BECAUSE THE UNDERLYING TRANSACTION ALLEGEDLY WAS VOID

Although the court of appeals characterized respondent's claim as one to establish her title to the former allotments, it did not even address the application of the QTA or the 12-year limitation on bringing an action under the QTA. See pages 21-27, *infra*. The court did acknowledge that, under 28 U.S.C. 2401(a), other civil actions brought against the United States in district court are barred unless the complaint is filed within six years of the date on



which the right of action first "accrues."[7] But it nevertheless held that 28 U.S.C. 2401(a) imposes no bar to this suit. In the court of appeals' view, in a suit brought by an Indian based on a land transaction that allegedly was void, "the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along" (Pet. App. 6a). Respondent endorses that interpretation of 28 U.S.C. 2401(a), and she argues that the same interpretation should be given to the term "accrued" in 28 U.S.C. 2409a(f) if the Court holds that this suit must be brought under the QTA. See Br. in Opp. 15-16, 18.[8]

This novel rule, under which the application of the threshold bar to suit would turn on the merits of the plaintiff's claim, cannot be squared with the very premise of a statute of limitations, which is to preclude a suit after passage of the specified period of time irrespective of the merits of the underlying action. *Block* v. *North Dakota*, 461 U.S. at 291-292. The court of appeals' rule also is completely inconsistent with the purposes underlying such statutes of repose: "although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having

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[7] The court did not indicate whether it regarded respondent's suit as one for money damages under the Tucker Act, 28 U.S.C. 1346(a)(2), or as a suit for an allotment under 25 U.S.C. 345 and 28 U.S.C. 1353. As we explain below (see pages 33-47, *infra*), the district court had no jurisdiction over this suit under the latter two provisions. But even if it did, this suit would be barred by the six-year statute of limitations in 28 U.S.C. 2401(a). See pages 47-49, *infra*.

[8] There is no reason to believe that the court of appeals would have reached a different conclusion with respect to the meaning of the term "accrued" in 28 U.S.C. 2409a(f) if it had addressed the question of the applicability of the QTA.

to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).[9] These purposes apply with full force where the plaintiff's claim is that the prior transaction by which the defendant purportedly acquired title is void. Cf. *Joines* v. *Patterson*, 274 U.S. 544, 553 (1927).

The court of appeals made no effort to reconcile its holding regarding when a cause of action brought by an Indian "accrues" with the purposes of statutes of limitations generally. Nor did it point to any support for that holding in the text, legislative history, or judicial construction of the statutes of limitations that are applicable to this case, 28 U.S.C. 2401(a) and 28 U.S.C. 2409a(f). The only authority the court of appeals cited was this Court's decision in *Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922). Pet. App. 4a-6a; see also Br. in Opp. 15-18. But as the court of appeals conceded (Pet. App. 4a-5a), this Court held in *Ewert* only that a state statute of limitations did not bar a suit brought by an Indian to recover land that had been sold in violation of a federal statutory prohibition. The Court made clear in *Oneida II* (slip op. 13 n.13) that this holding in *Ewert* rested on the principle that under the Supremacy Clause, state-law time bars do not apply of their own force to Indian land title claims. See also *United States* v. *Ahtanum Irrigation District*, 236

[9] The policy of repose underlying statutes of limitations has particular force where, as here, the dispute concerns title to real property. *Lewis* v. *Marshall*, 30 U.S. (5 Pet.) 470, 477-478 (1831); cf. *Arizona* v. *California*, 460 U.S. 605, 620 (1983).



F.2d 321, 334 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957).

The Court did not suggest in *Ewert* that, by virtue of the void nature of the underlying transaction, the cause of action to recover the land in question had not yet even accrued for purposes of the running of the state statute of limitations if that statute *did* apply. Cf. *Joines* v. *Patterson*, 274 U.S. at 553. Accordingly, *Ewert* in no way suggests that an otherwise applicable federal statute of limitations is without force and effect simply because the suit in question is brought by an Indian and is based on an allegedly void sale of land. A fortiori *Ewert* furnishes no support for the court of appeals' and respondent's efforts to avoid the explicit limitations Congress has imposed in 28 U.S.C. 2401(a) and 28 U.S.C. 2409a(f) on the bringing of suits against the United States. As we have explained (see pages 13-14, *supra*), such a limitation on Congress's waiver of sovereign immunity must be strictly enforced, and a court is "not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *United States* v. *Kubrick*, 444 U.S. at 117. Yet the court of appeals' interpretation of the term "accrues" renders the statute of limitations wholly inapplicable, and thus powerless to encourage the prompt presentation of claims, whenever the claim is based on an allegedly void transaction.

In any event, 28 U.S.C. 2409a(f) on its face forecloses the argument advanced by respondent and the court of appeals. That provision specifically provides that an action under the QTA "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." This provision makes

clear that it is sufficient to trigger the running of the limitations period that, as in this case, the plaintiff knew or should have known of the United States' claim of title, irrespective of whether that claim is valid or instead is based on a transaction that proves to have been void.[10]

There is no basis for giving a substantially different construction to 28 U.S.C. 2401(a). That Section requires that an action be brought within six years of when the "right of action *first* accrues" (emphasis added). The quoted language makes clear that the six-year period begins to run from the date on which the plaintiff first has a right to sue (*Soriano* v. *United States*, 352 U.S. at 275)—assuming that he knew or should have known of the factual basis for his suit (cf. *United States* v. *Kubrick*, 444 U.S. at 120, 122). The fact that the transaction giving rise to the cause of action under Section 2401(a) might have been void has no bearing on the plaintiff's right to sue when he first has that knowledge. Accordingly, the allegedly void nature of the transaction does not prevent the "accrual" of the right of action and the commencement of the running of the six-year limitations period under 28 U.S.C. 2401(a). In fact, if respondent's right of action truly has not

[10] The notion that the validity of the United States' claim of title affects the application of the QTA's limitations provision has been rejected in suits involving non-Indians. See *Stubbs* v. *United States*, 620 F.2d 775, 781 (10th Cir. 1980); *Knapp* v. *United States*, 363 F.2d 279, 282-283 (10th Cir. 1980). It is the existence of a claim of title by the United States that gives rise to the right of action under the QTA. See 28 U.S.C. 2409a(d) (the jurisdiction of the district court shall cease if the United States, prior to trial, disclaims all interest in the property adverse to the plaintiff). It is consistent with this statutory premise to begin the running of the limitations period upon notice of that claim.



yet even "accrued," she presumably has no legal right to recover and her suit is premature. Cf. *Kendall* v. *United States*, 107 U.S. at 125. That obviously is not her position, or that of the court of appeals.

In sum, the only authority cited by the court of appeals—*Ewert* v. *Bluejacket*, *supra*—offers no support whatever for its holding that respondent's right of action has not accrued and that this suit is not barred by the statute of limitations. Nor is there any other support for this novel theory, on which the court of appeals' decision is entirely based.

## III. THIS SUIT IS IN ANY EVENT BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS, IRRESPECTIVE OF RESPONDENT'S THEORY OF RECOVERY

For the reasons stated in Point II, *supra*, the court of appeals' unprecedented rationale for holding that this suit is not barred by the statute of limitations is wholly without merit. In her brief in opposition, respondent has advanced several other arguments in defense of the judgment below. As we shall explain, however, this suit is barred irrespective of the manner in which respondent characterizes it.

### A. Because Respondent Disputes The United States' Title To The Former Allotments, This Suit Is Subject To the Quiet Title Act And Is Barred By Its 12-Year Statute of Limitations

Respondent voluntarily dismissed the complaint in this suit insofar as it sought rescission of the 1954 sales of the three allotments and the revesting of title in respondent and the other heirs of the original allottees. This left only her claim for money damages. Respondent's remaining suit for damages would appear to be one arising under the Tucker Act, 28 U.S.C. 1346(a)(2). See pages 28-32, *infra*.

The court of appeals, however, elected not to read respondent's partial dismissal as an abandonment of her basic contention that sale of the parcels without her consent was void and that she therefore retains title to the land (Pet. App. 4a, 6a). Instead, it believed that the claim for damages should be construed as the equivalent of a claim for return of the land itself (*id* at 6a-7a). The court believed that "[i]n light of the land's inclusion within the Chippewa National Forest and the thirty years which have passed since the sale," if respondent's claims have merit, "she may force the government to pay her the fair market value of the land rather than to simply return the land itself" (*id.* at 8a). If the court of appeals is correct that respondent's complaint still should be construed to assert a claim of title to the three former allotments, then this suit necessarily arises under the Quiet Title Act, 28 U.S.C. 2409a, ard it is barred by the 12-year statute of limitations in that Act.[11]

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[11] In her complaint as originally filed, respondent sought, as an alternative to money damages, the rescission of the original sales and the revesting of title in her (J.A. 10). It therefore seems clear that the complaint stated a claim under the QTA insofar as it disputed the United States' title to the former allotments. Moreover, respondent included 28 U.S.C. 1346 among the alleged bases of jurisdiction (J.A. 7), and subsection (f) of Section 1346 grants the district courts jurisdiction of QTA actions under 28 U.S.C. 2409a(f).

Because respondent, on June 16, 1982, voluntarily dismissed her claim for revesting of title (J.A. 12), the United States' subsequent motion for summary judgment relied only on 28 U.S.C. 2401 in asserting that the suit is barred by the statute of limitations (C.A. App. 11). The district court, noting that respondent sought only damages (Pet. App. 9a), held that the suit is barred by 28 U.S.C. 2401(a). For this reason, the application of 28 U.S.C. 2401(a) was the principal issue discussed in the government's brief on appeal. However, the government's brief also stated that "while not pled



1. In the Quiet Title Act (QTA), Congress consented, with certain exceptions, to the naming of the United States as a party defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. 2409a(a). This Court held in *Block* v. *North Dakota* that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." 461 U.S. at 286 (footnote omitted). The Court applied this rule in *Block* to hold that a State may bring an action only under the QTA to establish its title to real property in which the United States claims an interest, and that the conditions on bringing an action under the QTA—including its 12-year statute of limitations—cannot be avoided by resorting to another form of action. 461 U.S. at 280-286. So, too, the QTA is the exclusive means by which an Indian may bring an action, such as the instant suit, that challenges the United States' title to real property.

Indeed, Congress specifically focused on Indians when it enacted the QTA, yet did not fashion an exception for suits brought by Indians. The QTA expressly "does not apply to trust or restricted Indians

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below, any action to quiet title to this land is barred as well by virtue of the twelve-year statute of limitations in 28 U.S.C. 2409a(f)." Gov't C.A. Br. 8 n.6. See also *id.* at 9 n.8. After the panel chose to construe respondent's complaint, despite the partial dismissal, to continue to assert a claim of title, the government addressed the application of the QTA at length in its petition for rehearing with suggestion for rehearing en banc. That petition was denied without comment (Pet. App. 13a).

lands" (28 U.S.C. 2409a(a)).[12] That language was intended to prevent "[a] unilateral waiver of the defense of sovereign immunity" as to land that the United States holds in trust for Indians: it thereby serves to protect the United States and the Indian beneficiaries from litigation and adverse claims by others and to preserve the commitments the United States has made to the Indian people. *Dispute of Titles on Public Lands: Hearing on S. 216, S. 579 and S. 721 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. 19 (1971) [hereinafter cited as *QTA Hearing*]. See *Block* v. *North Dakota*, 461 U.S. at 283, 285, S. Rep. 92-575, 92d Cong., 1st Sess. 2 (1971); H.R. Rep. 92-1559, 92d Cong., 2d Sess. 10-11 (1972). In other words, this language excludes from Congress's waiver of sovereign immunity those cases in which the Indians' interests are aligned with those of the United States as a defendant. The exception does not encompass suits brought by an Indian as a plaintiff to challenge the United States' title to real property that the government does not ostensibly hold in trust for the Indians, but instead holds for other purposes (such as the National Forest in this case). See, *e.g.*, *Grosz* v. *Andrus*, 556 F.2d 972 (9th Cir. 1977). Cf. *Three Affiliated Tribes* v. *Wold Engineering*, No. 82-629 (May 29, 1984), slip op. 8-12. The absence of any such exception for suits brought by

[12] The second sentence of 28 U.S.C. 2409a(a) provides that the QTA does not apply to trust or restricted Indian lands and does not apply to or affect actions that can be brought under several specifically enumerated statutory provisions, including the Tucker Act (28 U.S.C. 1346, 1491) and the McCarran Amendment (43 U.S.C. 666), which consents to the naming of the United States in certain water rights adjudications. See, *e.g.*, *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983).



Indians reinforces the conclusion that such suits are within the scope of the QTA. As a result, an Indian plaintiff is treated the same as any other person who has a claim adverse to that of the United States, and the QTA accordingly is the Indian's exclusive avenue of relief.[13]

For the foregoing reasons, the court of appeals erred in failing to conclude that this suit is subject to the QTA. The court of appeals also erred in holding that where the plaintiff disputes the United States' title to land and seeks to establish his own title, he may force the United States to pay him compensation in the amount of the full market value of the land, rather than to return the land. Under the QTA, if the final determination of title is adverse to the United States, the United States is expressly given the right to retain possession, upon payment to the plaintiff of the amount the district court finds to be just compensation, rather than to be disturbed in its possession. 28 U.S.C. 2409a(b). Affording this "discretionary option" to the government was intended "to insure that the waiver [of sovereign immunity] would not 'serve to disrupt costly ongoing Federal programs that involve the disputed lands'" (*Block* v. *North Dakota*, 461 U.S. at 283, quoting *QTA Hearing* 2, 19). Congress did not, however, confer on the QTA plaintiff who prevails on his claim of title a parallel right to insist upon the payment of compensation rather than the return of the land. This omission from the "precisely drawn" and "de-

[13] Respondent errs in relying (Br. in Opp. 16) on *Spaeth* v. *Secretary of the Interior*, 757 F.2d 937 (8th Cir. 1985), for the proposition that this suit is not covered by the QTA. In *Spaeth*, the United States claimed that the parcels of land in question were "trust or restricted Indian lands" within the meaning of 28 U.S.C. 2409a. See 757 F.2d at 942-943.

tailed" provisions of the QTA (*Block* v. *North Dakota*, 461 U.S. at 285) indicates that Congress deliberately withheld that option from the plaintiff. See *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).[14]

2. If, as we submit, jurisdiction over this case lies exclusively under the QTA insofar as respondent seeks to establish her title to and recover her interests in the former allotments (or to obtain a money judgment in lieu of recovering the property interests), then the suit is barred by the 12-year statute of limitations in 28 U.S.C. 2409a(f) for actions brought under the QTA.

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[14] Where the United States has lawfully acquired property without paying just compensation at the time of the acquisition, the property owner may bring an action under the Tucker Act to recover that compensation—at least where Congress has not made the Tucker Act unavailable. See *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 27-28; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-136, 148 (1974). In this case, however, respondent alleges that the Secretary's sale of her interests in the three allotments without her consent was unlawful under 25 U.S.C. 483 and other statutory provisions. See Br. in Opp. 2-3, 8, 10; J.A. 8. It is well settled that unauthorized conduct by an agent of the government is not the act of the government and therefore is not a taking of property for which the Fifth Amendment requires the payment of compensation. See *Ruckelshaus* v. *Monsanto Co.*, slip op. 27; *Regional Rail Reorganization Act Cases*, 419 U.S. at 127 n.16, quoting *Hooe* v. *United States*, 218 U.S. 322, 336 (1910); *United States* v. *North American Co.*, 253 U.S. 330, 334 (1920). Respondent's claim for a money judgment on the theory that her property was taken for public use without just compensation therefore must fail. If respondent were to regard the sales in 1954 as lawful and to premise her claim to just compensation on an allegation that she did not receive payment for her interests in the allotments at that time, the instant action would in any event be barred by the six-year statute of limitation in 28 U.S.C. 2401(a). See pages 28-32, *infra*.



The Court held in *Block* v. *North Dakota* that a State, like any other party who wishes to take advantage of the waiver of sovereign immunity in the QTA, must comply with the statute of limitations in 28 U.S.C. 2409a(f), which requires that a suit under the QTA shall be barred unless it is brought within 12 years of the date on which it accrued. In concluding that suits brought by States are covered by this statutory condition, the Court relied on the all-inclusive statutory language that imposes a limitation on the bringing of "[*a*]*ny* civil action" under the QTA; the absence of any indication in the legislative history that suits brought by States were meant to be excluded; and the necessarily uniform policy of repose embodied in the limitations period to protect the national public interest. 461 U.S. at 287-290. These same considerations require the conclusion that the generally applicable federal statute of limitations in 28 U.S.C. 2409a(f) also applies to a suit brought by an Indian against the United States to adjudicate a disputed title to real property. See *Grosz* v. *Andrus*, 556 F.2d 972, 974-975 (1977). Cf. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 115-124 (1960).

Section 2409a(f) provides that an action under the QTA "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." In this case, the district court found that respondent knew of the sales in 1954 (Pet. App. 10a). This suit, which was commenced in 1981, more than a quarter of a century later, therefore is clearly barred by the 12-year statute of limitations under the QTA.

**B. Respondent's Suit Is Barred By The Six-Year Statute Of Limitations In 28 U.S.C. 2401(a) Insofar As She Seeks Damages For Allegedly Unlawful Conveyances Of The Allotments In 1954**

Respondent also has characterized her suit as one seeking money damages for a breach of fiduciary duty by the United States based on allegedly unlawful sales of the allotments in 1954 without her consent. See J.A. 8, 10; Br. in Opp. 9-12; Pet. App. 6a. She argues that the district court has jurisdiction over such a damages claim under the Tucker Act, 28 U.S.C. 1346(a)(2), by virtue of this Court's decisions in *United States* v. *Mitchell* (*Mitchell I*), 445 U.S. 535 (1980) and *United States* v. *Mitchell* (*Mitchell II*), 463 U.S. 206 (1983). See Br. in Opp. 7-12; J.A. 7.[15]

We agree that the Tucker Act would furnish a basis of jurisdiction over a damage action such as this.[16] However, the district court now is barred from

[15] The district courts and Claims Court have concurrent jurisdiction over suits for money damages under the Tucker Act where the amount in controversy is $10,000 or less. 28 U.S.C. 1346(a)(2), 1491. Where the amount in controversy exceeds that amount, the Claims Court's jurisdiction is exclusive.

[16] Of course, the Tucker Act itself creates no substantive right to money damages. For this reason, as respondent acknowledges (Br. in Opp. 9, 10-12), in order to recover in a suit under the Tucker Act, respondent would be required to establish that whatever statutory provision she maintains was violated by the sales in 1954 "'"can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."'" *Mitchell II*, 463 U.S. at 217, quoting *United States* v. *Testan*, 424 U.S. 392, 400 (1976), and *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967).

Respondent also alleged that the Secretary was "negligent" in selling the allotments without the consent of everyone who had an interest in them (J.A. 10). Perhaps respondent thereby intended to state a cause of action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* However, any claim under the FTCA is barred unless it is presented to the appropriate federal agency within two years after it accrues or unless the action is begun within 6 months of the notice of final denial of the claim. 28 U.S.C. 2401(b). See 28 U.S.C. 2675. This provision applies equally to a tort claim by an Indian. *Mann* v. *United States*, 399 F.2d 672, 673 (9th Cir. 1968). There has been no suggestion that respondent submitted a claim to the Department of the Interior within two years of the sales by the Secretary in 1954, and any action under the FTCA would have long since been barred by the time this suit was filed in 1981.



exercising that jurisdiction by the six-year statute of limitations in 28 U.S.C. 2401(a), which respondent concedes (Br. in Opp. 17) is applicable to a Tucker Act suit brought in district court. Section 2401(a) provides that, except as provided under the Contract Disputes Act of 1978, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Just as the broad reference in the QTA's statute of limitations to "[a]ny civil action" includes actions filed by Indians, so too the broad reference in Section 2401(a) to "every civil action" includes a suit filed by an Indian—here, a suit under the Tucker Act for money damages.

There is no indication that Congress contemplated an implied exception from the plain language of Section 2401(a) for a Tucker Act suit brought by an Indian. To the contrary, in *Mitchell I*, this Court recognized the intent of Congress to treat Indians and non-Indians alike under the Tucker Act. There, the Court considered 28 U.S.C. 1505, which granted the Court of Claims (now the Claims Court) jurisdiction over any claim for money damages against the United States by an Indian tribe. The Court quoted the

legislative history of the provision, which stated that the tribal claimants " 'are to be entitled to recover in the same manner, to the same extent, *and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses,* both at law and in equity, * * * as in cases brought in the Court of Claims by non-Indians under [28 U.S.C. 1491].' " 445 U.S. at 539 (emphasis added), quoting H.R. Rep. 1466, 79th Cong., 1st Sess. 13 (1945). In particular, it was intended that such Indian tribal claims would be governed by the six-year statute of limitations in what is now 28 U.S.C. 2501, which is applicable to all Tucker Act suits in the Claims Court under 28 U.S.C. 1491. *Creation of Indian Claims Commission: Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs,* 79th Cong., 1st Sess. 149 (1945) (section-by-section analysis submitted by Felix Cohen). See *Lindahl* v. *OPM,* No. 83-5954 (Mar. 3, 1985), slip op. 18.[17] It follows *a fortiori* that Tucker Act claims brought in the Claims Court by individual Indians, which arise directly under 28 U.S.C. 1491, are likewise governed by the six-year statute of limitations in 28 U.S.C. 2501.

[17] The permanent provision vesting the Court of Claims with jurisdiction over tribal claims was intended to eliminate the need for special jurisdictional acts to enable the Court of Claims to consider tribal claims. See *United States* v. *Dann,* No. 83-1476 (Feb. 20, 1985), slip op. 6-7. These Acts often imposed time limitations for the consideration of Indian claims. See, *e.g.,* Act of June 3, 1920, ch. 222, 41 Stat. 738-739. In addition, in 1946, when Congress enacted 28 U.S.C. 1505 and created the Indian Claims Commission to adjudicate claims arising prior to 1946 (25 U.S.C. (1970 ed.) 70 *et seq.*), it imposed a five-year limitation on the period within which claims could be brought before the Commission. 25 U.S.C. (1976 ed.) 70. Congress's pattern of imposing such time limits in statutes that specifically address claims by Indians against the United States substantially undermines any argument for an implied exception from generally applicable statutes of limitation for such suits.



Correspondingly, the Court of Claims and Federal Circuit uniformly have held that suits for money damages brought by Indian tribes or individual Indians against the United States are subject to the six-year statute of limitations in 28 U.S.C. 2501. In so holding, those courts have rejected the proposition that the existence of a fiduciary or trust relationship between the United States and the Indians with respect to the property in question rendered the statute of limitations inapplicable. See, *e.g., Menominee Tribe* v. *United States,* 726 F.2d 718, 721-722 (Fed. Cir. 1984), cert. denied, No. 83-1922 (Oct. 1, 1984); *Hydaburg Co-Op Ass'n* v. *United States,* 667 F.2d 64, 69-70 (Ct. Cl. 1981), cert. denied, 459 U.S. 905 (1982); *Fort Mojave Tribe* v. *United States,* 210 Ct. Cl. 727, 728 (1976); *Andrade* v. *United States,* 485 F.2d 660, 664 (Ct. Cl. 1973), cert. denied, 419 U.S. 831 (1974); *Capoeman* v. *United States,* 440 F.2d 1002 (Ct. Cl. 1971).[18] In light of this consistent in-

[18] In *Capoeman,* the Court of Claims also rejected the contention that Indians are excluded from the running of the limitations period by virtue of the provision in 28 U.S.C. 2501 (which likewise appears in 28 U.S.C. 2401(a)) that the claim of a person "under legal disability or beyond the seas" at the time the claim accrues may be filed within three years after the disability ceases. See 440 F.2d at 1003-1005. The court construed this language to refer to a legal disability that impaired the claimant's access to the court. *Id.* at 1004; see also *Goewey* v. *United States,* 612 F.2d 539, 544 (Ct. Cl. 1979). There has been no suggestion in this case that respondent was under a legal disability that tolled the running of the limitations period under 28 U.S.C. 2401(a). She presumably was as capable of suing in 1954 as she was in 1981. See, *e.g., Poafpybitty* v. *Skelly Oil Co.,* 390 U.S. 365, 368-369 (1968). Cf. *Oneida II,* slip op. 7-8. The existence of this express ex-

terpretation, there is no reason why an implied exception to the parallel six-year statute of limitations in 28 U.S.C. 2401(a) should be recognized for suits brought by Indians. And in fact no such exception has been recognized. See *Loring* v. *United States*, 610 F.2d 649, 650 (9th Cir. 1979); *Christensen* v. *United States*, 755 F.2d 705, 706-707 (9th Cir. 1985), petition for cert. pending, No. 85-372; *Big Spring* v. *United States Bureau of Indian Affairs*, 767 F.2d 614, 616-617 (9th Cir. 1985).

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ception for certain claimants who might be incapable of suing within the six-year period further reinforces the conclusion that Indians who are not under such a particularized disability are, like all other claimants, covered by the statutes of limitations in 28 U.S.C. 2401(a) and 2501. See *Soriano* v. *United States*, 352 U.S. at 272-274; *Kendall* v. *United States*, 107 U.S. at 125.

The Court of Claims did suggest in *Capoeman* that the statute of limitations in 28 U.S.C. 2501 might not bar a suit brought by an Indian after the passage of six years from the date on which it first could have been brought if: the suit involved a liquidated claim for money, the money had been appropriated by Congress, and the government did not contest the validity of the claim. 440 F.2d at 1003. See also *Christensen* v. *United States*, 583 F. Supp. 1539, 1540-1541 (D. Nev. 1984), aff'd, 755 F.2d 705, 706-707 (9th Cir. 1985), petition for cert. pending, No. 85-372. In such a case, however, there is no real "exception" to the statute of limitations. The United States holds the funds in question for the benefit of the plaintiff and is under a continuing duty to make the funds available to the plaintiff upon demand, whether or not six years have passed since the time at which he first might have made such a demand. See *United States* v. *Taylor*, 104 U.S. 216, 221-222 (1881). This rationale has no application here.



### C. Respondent Is Foreclosed From Bringing An Action Under 25 U.S.C. 345 And 28 U.S.C. 1353, Which Permit The District Courts To Entertain Suits Involving A Right To An Allotment

In addition to relying on 28 U.S.C. 1346, which confers jurisdiction on the district courts over Tucker Act and QTA suits (28 U.S.C. 1346(a)(2) and (f)), respondent also alleged that the district court had jurisdiction under 25 U.S.C. 345 and 28 U.S.C. 1353 (J.A. 7). As we explain below, these provisions do not furnish a basis for jurisdiction in this case. But even if they did, respondent's suit would be barred by the six-year statute of limitations in 28 U.S.C. 2401(a) that is applicable to "every civil action commenced against the United States" in district court.

#### 1. *The District Court Did Not Have Jurisdiction Under 25 U.S.C. 345 Or 28 U.S.C. 1353*

The two statutory provisions pertaining to allotments upon which respondent relies were intended to confer jurisdiction on the district courts only with respect to suits for an "original allotment." F. Cohen, *Handbook of Federal Indian Law* 380 n.184 (1942). This case, however, presents no question of a right to receive an original allotment of reservation land under the General Allotment Act or the Nelson Act; the parcels in which respondent now claims an interest were allotted to the original allottees, respondent's ancestors, in 1905 (Pet. App. 5a). The parcels then were sold by the Secretary almost 50 years later. Respondent contends that those sales were unlawful, and she seeks to establish her title to the allotments and obtain a money judgment in lieu of their return. A district court has no jurisdiction under 28 U.S.C. 345 and 28 U.S.C. 1353 over such a suit, because those statutory provisions do not extend to a challenge to the administration or disposition of

a parcel of land after it has been allotted. And at least since the passage of the QTA, those provisions also do not confer jurisdiction over a suit to adjudicate a disputed title to a previously allotted parcel in which the United States claims an interest in a capacity other than that of trustee for the Indians concerned.

1. The statute upon which respondent principally relies, 25 U.S.C. 345, provides in relevant part:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding * * * involving the right of any person * * * to any allotment of land under any law or treaty * * *; and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him[.]

In a number of respects this provision on its face is limited to a suit by an Indian to establish his right to receive an allotment from the Secretary. First, it refers to an Indian who is "entitled to an allotment," who claims to be so entitled, or claims to have been "unlawfully denied or excluded from any allotment



or any parcel of land" to which he is entitled under an Act of Congress. All of these phrases would appear to refer to a person who is claiming a right under an Act of Congress to participate, along with other members of the tribe concerned, in the Secretary's initial dividing up of the reservation in severalty. Moreover, the jurisdictional grant is specifically limited to those suits "involving the right of any person * * * to any allotment." This language does not encompass a plaintiff, such as respondent in this case, who is seeking to recover a parcel of land that *previously* was patented to an Indian in satisfaction of his right to an allotment and then conveyed out of trust status.

The interpretation of 25 U.S.C. 345 just suggested is reinforced by two features of its concluding clause. First, that clause refers to a "claimant to an allotment," which likewise connotes a person claiming an entitlement to receive an allotment from the Secretary in the first instance. Second, it provides that the court's judgment in a suit under 25 U.S.C. 345, when certified to the Secretary, shall have the same effect "as if such allotment had been allowed and approved by him." As the General Allotment Act makes clear, an allotment is "allowed and approved" by the Secretary as part of the initial division and assignment of reservation land to individual Indians. See *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 142 (1972).[19] The judgment the plaintiff seeks in a suit

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[19] As stated in the General Allotment Act, 25 U.S.C. 331 (the President is authorized "to cause allotment to each Indian located [on the reservation] to be made * * * not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian"); 25 U.S.C. 333 ("The allotments * * * shall be made by special agents appointed by the President * * * under such rules and regulations as the Secretary of the Interior may from time to time pre-

under 25 U.S.C. 345 therefore is the equivalent of an order directing the Secretary to take the steps necessary for the issuance of a patent. By contrast, in a suit brought by an Indian to recover a previously allotted parcel of land that was sold by the United States, the recovery of possession of the land and the confirmation of equitable title in the Indian is not the equivalent of an original allotment of the parcel.

2. The interpretation of 25 U.S.C. 345 suggested by its plain language (which does not encompass this suit) is confirmed by its origins and by the legislative history of several amendatory acts. Section 345 is derived from the Act of August 15, 1894, ch. 290, 28 Stat. 305, an Act appropriating money for the conduct of Indian affairs. The paragraph immediately preceding the predecessor to 25 U.S.C. 345 appropriated money to allow the President to survey Indian lands "and to complete the allotment of the same" pursuant to the General Allotment Act of 1887. See 28 Stat. 304-305. The quoted phrase indicates that the term "allotment" was understood to refer to the process of assigning parcels to individuals, which would be "complete[d]" within a discrete period of time. The most reasonable construction of the succeeding paragraph, the present 25 U.S.C. 345, is that it was intended only to resolve disputes concerning the entitlement of individual Indians that might arise during that transitional process of division and assignment. In other words, as one court construing the Act soon after enactment explained, it was intended "to settle the rights of parties seeking allotments in severalty" and "was adopted for the pur-

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scribe, and shall be certified by such special allotting agents."); 25 U.S.C. 348 ("Upon approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees * * *.").



pose of affording to claimants who were refused recognition by the land department the opportunity to litigate their rights before a judicial tribunal." *Sloan* v. *United States*, 95 F. 193, 195 (C.C.D. Neb. 1899), appeal dismissed, 193 U.S. 614 (1904).

At every step, the subsequent history of 25 U.S.C. 345 confirms this limited scope:

a. The committee reports on the Act of February 6, 1901, ch. 217, 31 Stat. 760 *et seq.*, which amended the 1894 Act to provide for a manner of securing service in suits arising under it, stated that the 1894 Act "authorize[d] the institution of suits or proceedings in the circuit court [now the district court] of the United States by *claimants for allotments of Indian land.*" H.R. Rep. 1714, 56th Cong., 1st Sess. 1 (1901) (emphasis added); S. Rep. 2040, 56th Cong., 2d Sess. 1 (1901). There was no suggestion that Congress intended to consent to suits by Indians against the United States with respect to other matters that might arise after the original claimants had obtained their allotments, as in this case.

b. In 1906, Congress excepted the Osage Indians from the coverage of the 1894 Act in a manner that is directly relevant to the interpretation of the present 25 U.S.C. 345. See Act of June 28, 1906, ch. 3572, § 1, 34 Stat. 540; *United States ex rel. Jump* v. *Ickes*, 117 F.2d 769 (D.C. Cir. 1940), cert. denied, 313 U.S. 575 (1941). Section 1 of the 1906 Act provided that the roll of the Osage Tribe that was then shown on the records of the United States was to be regarded as the final roll, although Section 1 permitted the Secretary to revise that roll in certain respects. Section 2 of the 1906 Act provided for the selection of allotments by members of the Osage Tribe, with all controversies to be settled by a Commission consisting of three members of the Tribe. 34 Stat.

541. Section 1 of the 1906 Act further stated that the provisions of the 1894 Act "granting persons of Indian blood who have been *denied allotments* the right to appeal to the courts, are hereby repealed as far as the same relate to the Osage Indians" (34 Stat. 540; 25 U.S.C. 345 note (emphasis added)). Congress thus placed in statutory form an interpretation of the 1894 Act that limits its reach to suits by Indians who were "denied allotments" by the Secretary. This interpretation also is evident from the fact that Congress believed the 1894 Act would be unnecessary for the Osage Indians because all matters pertaining to the allotment process were to be resolved by the special Osage Commission. Congress therefore obviously did not contemplate that an Indian would have occasion to invoke that statute after he received his allotment.

c. This same understanding is reflected in the text and legislative history of the 1911 revision of the judicial code, which, inter alia, vested jurisdiction to entertain suits under 25 U.S.C. 345 in the district courts, rather than the circuit courts, as under the 1894 Act. See Act of Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167. Consistent with this action, Congress included in the section of the judicial code that contained the various jurisdictional grants to the district courts a grant of jurisdiction "[o]f all actions, suits, or proceedings involving the *right of any person*, in whole or in part of Indian blood or descent, *to any allotment of land under any law or treaty.*" § 24(24), 36 Stat. 1094 (emphasis added). As we have explained (see page 35, *supra*), the emphasized language, which was drawn directly from the jurisdictional grant in the 1894 Act, connotes a suit to obtain an allotment in the first instance.

Moreover, the cases that had arisen under the 1894 Act by the time of the 1911 revision of the judicial code involved questions of an Indian's entitlement to



receive an allotment or disputes between several Indians claiming a right to an allotment of the same parcel of land.[20] One such case was cited in the legislative history. See S. Rep. 388, 61st Cong., 2d Sess. Pt. 1, at 62 (1910), citing *Smith* v. *He-Yu-Tse-Mil-Kin*, 110 F. 60 (C.C.D. Or. 1901), aff'd, 194 U.S. 401 (1904). Because the jurisdictional grant enacted in 1911 (the present 28 U.S.C. 1353) was "but a codification" of the then-existing jurisdictional grant in the 1894 Act (*First Moon* v. *White Tail*, 270 U.S. 243, 245 (1926)), the background of its enactment indicates that both 25 U.S.C. 345 and 28 U.S.C. 1353 are to be understood to be confined to such suits.

d. Finally, an amendment to the new judicial code enacted shortly thereafter reflects the same view of the jurisdictional provision. As originally enacted in March 1911, that provision did not contain the exception in the 1894 Act for lands held by the Five Civilized Tribes or the Quapaw Indian Agency. Compare 28 Stat. 305 with 36 Stat. 1094. Congress quickly corrected that omission in the Act of December 21, 1911, ch. 5, 37 Stat. 46 *et seq.* "The original act did not apply to the Five Civilized Tribes of Indians nor the Quapaw Agency, for the reason that the determination of allotments was contemplated to be exercised by the Commission to the Five Civilized Tribes" (48 Cong. Rec. 576 (1911)).[21] Congress

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[20] See, *e.g.*, *Sloan* v. *United States*, *supra*; *Waldron* v. *United States*, 143 F. 413 (C.C.D.S.D. 1905); *Guyett* v. *McWhirk*, 154 F. 784 (C.C.D. Or. 1907); *United States* v. *Fairbanks*, 171 F. 337 (8th Cir. 1909), affd, 223 U.S. 215 (1912); *Reynolds* v. *United States*, 174 F. 212 (8th Cir. 1909).

[21] See generally *Woodward* v. *de Graffenried*, 238 U.S. 284 (1915); F. Cohen, *Handbook of Federal Indian Law* 773-777 (1958).

feared that the omission of a parallel exception from the jurisdictional provision enacted in March 1911 might "lead to extended litigation and delay the settlement of the affairs of the Five Civilized Tribes for some years to come." S. Rep. 147, 62d Cong., 2d Sess. 2 (1911). As in the case of the Osage Tribe (see page 38, *supra*), Congress's conclusion that the jurisdictional grants in 25 U.S.C. 345 and 28 U.S.C. 1353 were unnecessary after the allotment process for the Five Civilized Tribes was completed by the Dawes Commission further demonstrates that Congress did not intend a role for those provisions with respect to Indians who already had received an allotment.

Moreover, the House Report on the Act of December 21, 1911 stated that "[t]he plain intention of [the 1894 Act] was to authorize any person claiming to be entitled to *receive an allotment* to prosecute his claim" (48 Cong. Rec. 576 (1911) (emphasis added)). The report further observed that the obvious purpose of the revision of the judicial code in March 1911 was to give the district courts the same jurisdiction theretofore exercised by the circuit courts. However, the report noted that the language used was "ambiguous," and it explained that the amended version of the jurisdictional grant conformed to the 1894 Act by providing "a remedy to any claimants *for an allotment alleged to be unlawfully denied*" (*ibid.* (emphasis added)). Thus, whatever ambiguity might previously have existed, Congress made clear when it enacted the Act of December 21, 1911 ~~amendments~~ (as it had before) that the provisions now contained in 25 U.S.C. 345 and 28 U.S.C. 1353 were intended to confer jurisdiction only over suits to obtain an original allotment that the Secretary had improperly withheld.

3. This Court's decisions reflect the same view of 25 U.S.C. 345 and 28 U.S.C. 1353. In *First Moon* v. *White*



*Tail*, *supra*, the Court held that the present 28 U.S.C. 1353 did not confer jurisdiction on the district court to entertain an action brought against the United States and an heir of the original allottee by another Indian who also claimed to be an heir of the allottee but who had been determined by the Secretary not to be entitled to an interest in the allotment. The Court explained that the statutory provision "has reference to original allotments claimed under some law or treaty, and not to disputes concerning the heirs of one who held a valid and unquestioned allotment." 270 U.S. at 245. Similarly, in *Arenas* v. *United States*, 322 U.S. 419, 430 (1944), the Court observed that under 25 U.S.C. 345, "the courts have decided disputes between Indians and the Government as to the relative qualifications of two claimants to receive, as a member of a band, a patent, *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U.S. 401, and whether particular lands were appropriate for allotment, *United States* v. *Payne*, 264 U.S. 446 [(1924)]." See also *Halbert* v. *United States*, 283 U.S. 753, 755 (1931).

Most recently, in *Affiliated Ute Citizens* v. *United States*, 406 U.S. at 142, the Court said of 25 U.S.C. 345:

> This, however, is an allotment statute. Allotment is a term of art in Indian law. U.S. Dept. of the Interior, Federal Indian Law 774 (1958). It means a selection of specific land awarded to an individual allottee from a common holding. *Reynolds* v. *United States*, 174 F. 212 (CA8 1909). See the Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. §§ 331-334. Section 345 authorizes, and provides governmental consent for, only actions for allotment.

The Court cited for this proposition not only *First Moon* and *Arenas*, but also two court of appeals de-

cisions holding that 25 U.S.C. 345 is limited to suits to determine the right of an Indian to an allotment and "gives no general consent of the United States to be sued even in connection with its administration of allotments" (*United States* v. *Preston*, 352 F.2d 352, 355-356 (9th Cir. 1965); *Harkins* v. *United States*, 375 F.2d 239, 241 (10th Cir. 1967)).

Against this background, it is clear that 25 U.S.C. 345 and 28 U.S.C. 1353 permit suits only "for an original allotment." F. Cohen, *Handbook of Federal Indian Law* 380 n.184 (1942). Respondent does not advance a claim in this case for an "original allotment." Rather, she seeks to establish her title to three parcels that were conveyed out of trust status after their allotment and to recover a money judgment from the United States in lieu of recovering her interests in those parcels. Her claims therefore arise "in connection with [the government's] administration of [the] allotments" (*United States* v. *Preston*, 352 F.2d at 356)—namely, the Secretary's sale of those parcels, allegedly without her consent and in violation of 25 U.S.C. 483 and other statutory provisions. This suit therefore is not within the jurisdictional grant in 25 U.S.C. 345 or 28 U.S.C. 1353.[22]

[22] Although the Seventh Circuit has adhered to the view of the scope of 25 U.S.C. 345 and 28 U.S.C. 1353 discussed in the text (see *Coleman* v. *United States Bureau of Indian Affairs*, 715 F.2d 1156, 1162 (7th Cir. 1983)), the Eighth, Ninth and Tenth Circuits have construed those provisions to extend to more than suits for an original allotment. See, *e.g.*, *Fontenelle* v. *Omaha Tribe*, 430 F.2d 143 (8th Cir. 1970); *Gerard* v. *United States*, 167 F.2d 951, 953 (9th Cir. 1948); *Scholder* v. *United States*, 428 F.2d 1123, 1125-1126 (9th Cir.), cert. denied, 400 U.S. 942 (1970); *Loring* v. *United States*, 610 F.2d 649 (9th Cir. 1979); *Christensen* v. *United States*, *supra*; *Big Spring* v. *United States Bureau of Indian Affairs*, 767 F.2d 614, 616 (9th Cir. 1985); *Begay* v. *Albers*, 721 F.2d 1274 (10th Cir. 1983). However, these decisions did not consider the legislative history of 25 U.S.C. 345 and 28 U.S.C. 1353, discussed above, and the Ninth and Tenth Circuits previously had taken a contrary view (see *United States* v. *Eastman*, 118 F.2d 421, 423 (9th Cir. 1941); *Harkins* v. *United States*, 375 F.2d 239, 241 (10th Cir. 1967); *Vicenti* v. *United States*, 470 F.2d 845, 846 (10th Cir. 1972), cert. dismissed, 414 U.S. 1057 (1973).

For the reasons stated in the text, we believe that the more recent decisions of the Eighth, Ninth and Tenth Circuits, the earliest of which was rendered more than 50 years after the statutory provision was enacted in 1894 (compare *Mountain States Telephone & Telegraph Co.* v. *Pueblo of Santa Ana*, No. 84-262 (June 10, 1985), slip op. 16), are incorrect and should not be followed, especially since they are contrary to this Court's consistent interpretation. In *Begay* v. *Albers*, *supra*, the Tenth Circuit found an alternative basis of jurisdiction under 28 U.S.C. 1331 insofar as that case was brought against the private defendants. See 721 F.2d at 1279. This case of course does not involve the question whether an allottee claimant may bring such an action under 28 U.S.C. 1331.



4. Although the narrow scope of 25 U.S.C. 345 and 28 U.S.C. 1353 appears evident, it is not necessary in this case conclusively to resolve the precise nature of the cause of action and jurisdictional grant in those statutory provisions, particularly as against private parties. This is so because respondent does not in any event have a right of action against the United States under these provisions in the circumstances of this case.

Insofar as respondent disputes the title to the three parcels acquired by the United States in 1954, it now is irrelevant whether respondent might have brought such an action under 25 U.S. 345 and 28 U.S.C. 1353 prior to the enactment of the QTA in 1972. As this Court held in *Block* v. *North Dakota*, 461 U.S. at 284-286, the QTA is now the exclusive means by which any person, including an Indian, may obtain an adjudication of a disputed title to land in

which the United States claims an interest. See *Block* v. *North Dakota*, 461 U.S. at 284-286. If the result were otherwise, all of the "carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest"—including the QTA's 12-year statute of limitations—"could be averted." 461 U.S. at 284-285.[23] Moreover, under the court of appeals' view that respondent's demand for a money judgment in the amount of the current fair market value of her interests in the three parcels is to be viewed as the equivalent of a demand for the return of the property, that aspect of respondent's suit also is subject to the QTA and, for that reason alone, cannot be brought under 25 U.S.C. 345 and 28 U.S.C. 1353.[24]

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[23] In the sort of case for which 25 U.S.C. 345 and 28 U.S.C. 1353 were intended—a suit to obtain an original allotment from the United States—the plaintiff would not dispute the United States' title to the land. The plaintiff would acknowledge that title, held in trust for the Indians concerned, and simply seek to have the nature of the Indians' beneficial interest converted from common to individual ownership. Cf. *McKay* v. *Kalyton*, 204 U.S. 458, 468-469 (1907). Such a suit therefore would not be subject to QTA.

[24] To the extent Congress intended to preserve remedies against the United States under other statutory provisions when it enacted the QTA, it expressly so provided. See note 12, *supra*. But Congress did not include suits under 25 U.S.C. 345 and 28 U.S.C. 1353 among those exceptions. Any right of action that previously might have existed under those provisions to challenge the United States' title to real property accordingly did not survive enactment of the QTA. In light of this Court's then-recent decision in *Affiliated Ute*, which was rendered on April 24, 1972, and gave Section 345 a narrow reading that does not extend to quiet title actions against the United States (see page 41, *supra*), it is understandable that Congress did not include an exception for such suits when it enacted the QTA six months later, on October 25, 1972. Pub. L. No. 92-562, 86 Stat. 1176 *et seq.* Compare *Block* v. *North Dakota*, 461 U.S. at 282.



Nor, in our view, do 25 U.S.C. 345 and 28 U.S.C. 1353 furnish a basis of jurisdiction or a substantive right to money damages against the United States for breach of a fiduciary duty in connection with the administration of allotted lands—such as the alleged sale in 1954 of the three previously allotted parcels involved in this case. See *Vicenti* v. *United States*, 470 F.2d 845, 847-848 (10th Cir. 1972); *Harkins* v. *United States*, 375 F.2d 239, 241 (10th Cir. 1967). A waiver of the United States' sovereign immunity to a suit for money damages must be express. *Mitchell II*, 463 U.S. at 212. Nothing in the language of 25 U.S.C. 345 suggests the availability of money damages. To the contrary, that section prescribes a specific remedy of a wholly different sort: the judgment in favor of the claimant has the same effect, when certified to the Secretary, as if the allotment had been allowed and approved by the Secretary. The prescription of this remedy, in the nature of declaratory judgment, substantially undermines any argument that 25 U.S.C. 345 mandates the payment of compensation. Compare *Mitchell II*, 463 U.S. at 217.[25]

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[25] The court in *Antoine* v. *United States*, 637 F.2d 1177, 1182 (1981), opinion after remand, 710 F.2d 477 (8th Cir. 1983), believed that 25 U.S.C. 346 supported recognition of a right of action for money damages under 25 U.S.C. 345. Section 346 provides, inter alia, for the United States Attorney to answer a complaint filed under Section 345 by filing "a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises." The court in *Antoine* believed that the reference to a "set-off" meant that Congress contemplated that damages claims could be brought under 25 U.S.C. 345. The court read far too much into this single term. Section

Nor is there any indication in the legislative history of the predecessor statutes or 28 U.S.C. 1353 of an intent to expose the government to monetary liability. For these reasons, if any statute creates a substantive right to money damages in this case, it is not 25 U.S.C. 345, but 25 U.S.C. 483 or other statutory provisions that bar the sale of an allotment if not authorized by Congress. See, *e.g.*, 25 U.S.C. 348, 464. A suit to recover damages from the United States under those provisions, like such a damage action arising under any other Act of Congress, can be brought in district court only under the Tucker Act.

That the Tucker Act is the exclusive basis for respondent's damages action is evident from the text of the Tucker Act itself, which grants the district courts jurisdiction over civil actions against the United States, not exceeding $10,000 in amount, that are "founded * * * upon * * * *any* Act of Congress" (28 U.S.C. 1346(a)(2) (emphasis added)). The Tucker Act thus was intended to be a " 'comprehensive measure by which claims against the United States may be heard and determined." *Mitchell II*,

346 was enacted as Section 2 of the Act of February 6, 1901, 31 Stat. 760, discussed at page 37, *supra*. The purpose of that Act was to provide a "uniform manner for securing service" in cases covered by the 1894 Act. H.R. Rep. 1714, *supra*, at 1; S. Rep. 2040, *supra*, at 1. To accomplish that goal of uniformity, Congress simply incorporated verbatim into the present 25 U.S.C. 346 the terms of Section 6 of the Tucker Act (Act of Mar. 3, 1887, ch. 359, 24 Stat. 506), which prescribes the method of service under that Act. H.R. Rep. 1714, *supra*, at 1; S. Rep. 2040, *supra*, at 1. Because the provision was derived from the Tucker Act, it is natural that it would make reference to a possible "set-off." But that incorporation scarcely suggests that Congress intended to provide a cause of action for money damages when it enacted the predecessor to 25 U.S.C. 345 seven years earlier.



463 U.S. at 213, quoting H.R. Rep. 1077, 49th Cong., 1st Sess. 1 (1886). Moreover, in *Mitchell I* and *Mitchell II*, the plaintiffs sought to recover money damages based on violations of fiduciary duties imposed by various statutes governing the administration of allotments, and that suit was brought under the Tucker Act. Respondent similarly asserts (Br. in Opp. 10-12) that the Secretary's actions in this case violated fiduciary duties imposed by 25 U.S.C. 483 and other statutes. Respondent's efforts to recover money damages for these alleged violations therefore must also be brought under the Tucker Act, subject to the six-year statute of limitations in 28 U.S.C. 2401(a).

***2. This Suit Is Barred By The Six-Year Statute Of Limitations In 28 U.S.C. 2401(a) Even If Jurisdiction Does Lie Under 25 U.S.C. 345 or 28 U.S.C. 1353***

There is no need to consider further, however, whether 25 U.S.C. 345 and 28 U.S.C. 1353 furnish a basis for this suit against the United States. Even if they do, this suit remains barred by the six-year statute of limitations in 28 U.S.C. 2401(a). Section 2401(a) applies to "every civil action commenced against the United States" in district court.[26] This all-embracing language necessarily includes civil actions aginst the United States under 25 U.S.C. 345 and 28 U.S.C. 1353.

Respondent argues (Br. in Opp. 16-19), however, that the statute of limitations in 28 U.S.C. 2401(a)

[26] Section 2401(a) contains a single exception for suits under the Contract Disputes Act of 1978. See note 6, *supra*. In addition, if another, more specific statute of limitations applies to a particular suit, such as that under the FTCA or QTA (28 U.S.C. 2401(b) or 2409a(f)), the more specific provision applies.

applies only to actions under the Tucker Act. This argument has been rejected by every court of appeals that has considered the question. *Geyen* v. *Marsh*, No. 84-4607 (5th Cir. Nov. 5, 1985), slip op. 472-473; *Walters* v. *Secretary of Defense*, 725 F.2d 107, 113 (D.C. Cir. 1983), quoting *Werner* v. *United States*, 188 F.2d 266, 268 (9th Cir. 1951). See also *Christensen* v. *United States*, 755 F.2d at 706; *Impro Products, Inc.* v. *Block*, 722 F.2d 845, 850 n.8 (D.C. Cir. 1983), cert. denied, No. 84-170 (Oct. 29, 1984); *Boruski* v. *United States*, 493 F.2d 301, 304 n.5 (2d Cir.), cert. denied, 419 U.S. 808 (1974); *Screven* v. *United States*, 207 F.2d 740, 741 (5th Cir. 1953).

Respondent relies on the fact that prior to 1948, the paragraph that conferred Tucker Act jurisdiction on the federal district courts contained a six-year statute of limitations (see 28 U.S.C. (1946 ed.) 41(24)), but the paragraph that conferred jurisdiction over actions involving a right to allotments did not (see 28 U.S.C. (1946 ed.) 41(24)). She argues that 28 U.S.C. 2401(a) therefore should also be limited to suits under the Tucker Act. Respondent completely ignores the significance of the amendments Congress made in 1948.

The former Section 41(20) of Title 28 provided that "[n]o suit against the Government of the United States shall be allowed *under this paragraph* [*i.e.*, under the Tucker Act] unless the same shall have been brought within six years after the right accrued for which the claim is made" (emphasis added). By contrast, as a result of the 1948 revision, the relevant statute of limitations, 28 U.S.C. 2401(a), is not tied to any particular jurisdictional grant. It instead appears in Chapter 161 of Title 28, entitled "United States as Party *Generally*," and it applies to "*every* civil action commenced against the United States" (emphasis added). Thus, Congress clearly made the



statute of limitations in 28 U.S.C. 2401(a) applicable not only to suits arising under the Tucker Act (to which the limitations period in 28 U.S.C. (1946 ed.) 41(20) was expressly confined), but also to other actions against the United States, including those under 25 U.S.C. 345 and 28 U.S.C. 1353.

In sum, no matter what the theory of respondent's 27-year-old claim—whether it is viewed as an action to adjudicate a disputed title under the Quiet Title Act, a suit for money damages under the Tucker Act, or a proceeding involving a right to an allotment under 25 U.S.C. 345 and 28 U.S.C. 1353—it is barred by the applicable statute of limitations.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

F. HENRY HABICHT II
*Assistant Attorney General*

LAWRENCE G. WALLACE
*Deputy Solicitor General*

EDWIN S. KNEEDLER
*Assistant to the Solicitor General*

DAVID C. SHILTON
J. CAROL WILLIAMS
*Attorneys*

JANUARY 1986

## APPENDIX

## STATUTORY PROVISIONS INVOLVED

1. 25 U.S.C. 345 provides:

**Actions for allotments**

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the

Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

2. 25 U.S.C. 483 provides:

**Sale of land by individual Indian owners**

The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the provisions of sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title, or subchapter VIII of this chapter.

3. 28 U.S.C. 1353 provides:

**Indian allotments**

The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.

The judgment in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands held on or before December 21, 1911, by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency.



4. 28 U.S.C. 2401 provides:

**Time for commencing action against United States**

(a) Except as provided in the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

5. 28 U.S.C. 2409a provides in pertinent part:

**Real property quiet title actions**

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426) or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

* * * * *

(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

6. 28 U.S.C. 2501 provides:

**Time for filing suit**

Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.



A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account.

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No. 85-546

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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UNITED STATES OF AMERICA,

*Petitioner,*

vs.

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

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# RESPONDENTS' BRIEF

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DERCK AMERMAN
LEONARD A. ZOLNA, JR.
*Attorneys for Respondents*
2408 Central Avenue N.E.
Minneapolis, MN 55418
(612) 789-8805

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EDITOR'S NOTE

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## QUESTION PRESENTED

DOES THE GENERAL STATUTE OF LIMITATIONS, 28 U.S.C. 2401(a), BAR AN ACTION UNDER 25 U.S.C. 345 INVOLVING SPECIFIC LAND ALLOTMENTS WHERE THE CLASS CONSISTS OF INDIANS WHOSE LAND ALLOTMENTS WERE HELD IN TRUST FOR THEM BY THE UNITED STATES AND WERE SOLD WITHOUT THE CONSENT OF ALL THE OWNERS AND WITHOUT A COURT HEARING OR PROCEEDING?

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# RESPONDENTS' BRIEF

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## STATEMENT

The respondent is a Chippewa Indian who filed this action on December 30, 1981, seeking damages from the petitioner, United States of America, who held Indian land in trust for original allottees, their descendants, heirs and assigns, and transferred said trust allotments without consent or permission of said allottees, their descendants, heirs and assigns, including land owned by the plaintiff. The action is brought as a yet uncertified class action pursuant to Rule 23 of Federal Rules of Civil Pro-

cedure on behalf of herself and all others similarly situated. There are three apparent classes at this time: (1) all of those descendants, heirs and assigns of the original allottees relating to land that is located in the Leech Lake area of Cass County, Minnesota; (2) all of those descendants, heirs and assigns of the original allottees relating to the land that is located in the State of Minnesota; (3) all of those descendants, heirs and assigns of the original allottees relating to the land that is in the United States of America.

As the records indicate, in the Leech Lake area alone, there were 6,111 heirs in the 1950's. Consents obtained were from only 2,914 heirs. It is estimated that there are over 10,000 innocent victims located in the Leech Lake area alone. In addition, the Department of the Interior has indicated that there is a problem of significant magnitude in the Northern Great Plains area as well and perhaps in other areas of the United States (J.A. p. 40). The exact number of victims in each area remains undisclosed at this time.

Correspondence from the Department of the Interior itself indicates that the transactions represented in this class were "void", were a "direct result of an unauthorized administrative action" and of "BIA misfeasance". "The problem is that between 1948 and 1958 BIA officials approved numerous conveyances of inherited allotments without the requisite consents of all of the Indian landowners. This was done notwithstanding a June 24, 1955 Memorandum from the Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs advising that the interest of a non-consenting owner may not be sold by the Secretary. As a result, it appears that numerous transactions were entered



into without the requisite authority and are, therefore, void." (J.A. pp. 18 & 19)

It should be noted that this uncertified class action is not one for actual return of the property. There are, therefore, no innocent third parties nor bona fide purchasers for value that will be damaged if the relief prayed for is granted. It would seem that the defendant has an obligation not only to the plaintiffs in this class action who have had their property taken without their consent and without due process of law but also to protect the innocent third parties and bona fide purchasers for value by making restitution to the class of respondent in this action and thereby bar a future action in which innocent third parties and bona fide purchasers for value may suffer severe damage.

Petitioner continues to paddle semantics in its discussion and characterizes respondent as having dropped her claim for title. At no time in this proceeding did respondent drop her claim for title. To the contrary, the claim for title is the essence and bottom line of respondent's case. Her position is simply that the land remains in the name of Mottaz and the other heirs of the property despite what some pieces of paper executed by petitioner without her consent and without a court hearing purport to do. Part of the confusion arises over the failure to distinguish between a liability theory and a theory relating to an election of remedies for damages between the land itself and money. Theoretically, the land has remained in the name of Mottaz and the other heirs. The decision of the Eighth Circuit confirms this position. However, as a practical matter, some pieces of paper were issued by the petitioner and the problem remains as to how to treat those pieces of paper, which have now been filed of record with the County Recorder in Cass

County, Minnesota. This is what the word "rescission" more properly refers to. When we talk about rescission, we talk about a court order that will change the effect of those pieces of paper. The decision of the Eighth Circuit reflects the fact that a void transfer cannot effectively change title. If someone purported to transfer title to my house by executing an agreement that said that it was transferred from me to a grantee and if this was done without my consent or without some judicial determination allowing the transfer, it would be void and those pieces of paper would not theoretically change my ownership. However, it would create a pragmatic problem if the papers were filed with the County Recorder's office. The Eighth Circuit recognized the problem that respondent faces if the land is simply declared to be still in her name. In order to grant meaningful relief, then, in addition to the "liability issue", the "damages" issue also needs resolution. In order to accomplish this, the respondent and other heirs to the Mottaz property and the members of this uncertified class, or those that choose to do so, have then made an election of remedies on their damages, to-wit, to accept money damages representing the value of the land. This is probably the only workable solution for a class action, and as the Eighth Circuit recognized the only workable solution in the Mottaz situation because of the fact that there is no access to the parcel of land. This was all due to the actions of the United States that held the land in trust for the heirs and descendants of the original allottees. Without the additional remedy of being able to elect damages as an alternative, there would be no practical meaningful remedy for either Mottaz and the heirs on these parcels or other members of the class. Practical considerations, however, dictate that the



class made an election of remedies to accept money as the measure of damages.

According to the Bureau of Indian Affairs (BIA) records, three (3) Chippewa Indian ancestors of the respondent received trust allotments on the Leech Lake Reservation, located in the County of Cass, State of Minnesota, on December 5, 1905. The trust allotments were made pursuant to the *General Allotment Act of February 8, 1887*, 24 Stat. 388, 25 U.S.C. 331 et seq., and the *Nelson Act of January 14, 1889*, 25 Stat. 642. Title to these allotments were held in trust by the United States for a period of twenty-five (25) years and then extended indefinitely when the reservation voted to accept the provisions of the *Indian Reorganization Act of June 18, 1934*, 48 Stat. 985, 25 U.S.C. 461 et seq., specifically, Section 2, 25 U.S.C. 462. These trust allotments are identified as Leech Lake 855, 856, and 857, and were each 80 acres in size.

Respondent inherited a share of these allotments from her mother, Esther Taylor, aka Esther Grasshopper, LL-857, her mother's sister, Mary Knickerbocker, LL-855, and the latter's son, David Knickerbocker, LL-856. In 1954, during the extended trust period, these lands were transferred by the Department of the Interior to the United States Forest Service and now form part of the Chippewa National Forest. Respondent *never* made an application for the sale of these allotments, and she *never* signed a consent form approving the sale. Respondent *never* received payment and no proof of payment has ever been produced by petitioner. (Pl. Depos. p. 46).

In its Statement, petitioner asserts that some of the heirs who own fractional interests of the three (3) Mottza allotments petitioned the Department of the Interior to sell the

allotments. There was absolutely no showing at any of the stages in this proceeding that any of the heirs to the Mottaz allotments petitioned for sale. On the contrary, the form referred to at the bottom of page 2 was a mimeographed form that was apparently mailed out to all of the heirs of any of the parcels of land that petitioner had decided it wanted. The form itself was very misleading and, in fact, untrue. It suggested to the Indian recipient that other people involved in their particular allotment parcels had petitioned for sale. What the mimeographed form in fact stated, if it is to have any truth at all, is that some people involved in some of the parcels in Cass County may have requested the sale of their land. This was not, however, the three (3) Mottaz allotments. As the Statement correctly indicates in the case of these three (3) allotments, the United States as trustee sold the three (3) parcels to itself. The Eighth Circuit Court of Appeals specifically held in Mottaz that the failure of Mottaz to return the "Consent to Sale" form does not constitute consent.

Petitioner has argued that the "sales" were authorized under 25 U.S.C. 483, which "reinstated" the *Act of June 25, 1910*, 36 Stat. 855, 25 U.S.C. 372. The *Act of 1948* may have, in effect, repealed restrictions imposed under *The Indian Reorganization Act of 1934*, but we do not agree that the *Act of 1910* was fully reinstated. The language of the *Act of 1948*, 25 U.S.C. 483, clearly placed additional conditions on the sale of trust allotments, beyond the requirements of 25 U.S.C. 372. The *Act of 1948* specifically states that the Secretary of Interior is authorized to sell the property "upon application of the Indian owners". The petitioner in its Motion for Summary Judgment in the trial court stated that after 1958 all such sales were



made only of the fractional interest of *consenting* heirs. This modified procedure was followed even though no new statutes were passed since 25 U.S.C. 483 was enacted in 1948.

During the summer of 1981, respondent contacted an attorney for the first time to examine another allotment not in dispute in this case. After reviewing her papers, her attorney contacted the Bureau of Indian Affairs concerning the lands in dispute in this case, LL-855, LL-856, and LL-857. On or about November 25, 1981, an agent of the Bureau of Indian Affairs, in a telephone conversation with respondent's attorney, stated that respondent had a claim under the "2415 Land Claims Project", where allotments were sold and not all of the heirs conveyed their interest in the allotment (J.A. pp. 44 & 46). Upon notification that she had a cause of action, the respondent filed this lawsuit, which was commenced on December 30, 1981.

In short, this action was brought by an Indian respondent concerning her loss of interest and rights in allotment lands, which were sold by the petitioner without her application and consent, thereby depriving her of possession, use, enjoyment, and any income and improvements thereof.

Congress has clearly expressed a concern to protect such interest by enacting specific Indian laws that cannot be overridden by general laws that were *never* intended to apply to these special grants or rights. Furthermore, the petitioner, to its benefits, breached its fiduciary responsibility to the respondent by selling her allotment land without her consent to itself.

## HISTORICAL BACKGROUND

Trust allotments were originally granted when Congress passed the *General Allotment Act of February 8, 1887*, 24

Stat. 388, 25 U.S.C. 331 et seq., and the *Nelson Act of January 14, 1889*, 25 Stat. 642, whereby the United States Government provided up to 80 acres of land to individual Indians. The "trust" status of the land restricted its sale and imposed upon the government a responsibility to protect the land for the allottees. The Act was based on the theory that an Indian person who owned land would assimilate more easily into the white culture and become self-sufficient through farming. *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245 (1973). Noted Indian authority, Felix S. Cohen, in his *Handbook of Federal Indian Law* (1982 Ed.), pp. 131 and 132, states that the assimilationists and humanitarians were convinced that the "termination of tribal life was necessary if the Indian was to participate fully in the American system". Ironically, another aim of the allotment system was the protection afforded by a government patent versus tribal law or custom. See Cohen, supra, page 132.

Between 1887 and 1934, numerous pieces of legislation were passed that provided for removal of many of the restrictions on the sale, lease or grants of rights-of-way, to trust allotments. See 25 U.S.C. 319, 320, 336, 349, 357, 372, 379, 393, 395, 399, 402, 403, 404, and 405. The net result of these enactments was a steady erosion of Indian ownership in which trust allotments were passed from native ownership to non-Indian owners. Approximately 90 million acres out of a total of 138 million acres were sold during this time. See Cohen, supra, page 138. One historian, William Folwell, in the *History of Minnesota*, described this period as one of greed for land and resources caused by laws and acts that had "the appearance of a systematic premeditated scheme". A Department of Interior



report entitled the Meriam Report, Institute for Government Research, *The Problem with Indian Administration* (Baltimore: The John Hopkins Press, 1928), found that the Allotment Act had destroyed the Indian land base.

In an effort to stop such practices, the *Indian Reorganization Act of 1934*, 48 Stat. 985, 25 U.S.C. 461 et seq., was passed, and once again Indian trust allotments were restricted, 25 U.S.C. 462, unless they were sold to the Indian tribes, 25 U.S.C. 464.

The pressure to remove restriction on Indian allotments arose again, resulting in the passage of an *Act on May 14, 1948*, 62 Stat. 236, 25 U.S.C. 483, which allowed the sale of allotment land once again, but only "upon the application of the Indian owners".

## ARGUMENT

### JURISDICTION:

The district court below had jurisdiction to hear this claim pursuant to 25 U.S.C. 345, and 28 U.S.C. 1346 (a)(2) and (b).

The issues of jurisdiction and the government's trust responsibility involved in this case have been in effect decided by the two cases of *United States v. Mitchell*, 100 S.Ct. 1349 (1980) and *United States v. Mitchell*, 102 S.Ct. 2961 (1983), referred to respectively hereafter as *Mitchell I* and *Mitchell II*.

These historic decisions clarified the jurisdictional issue for actions brought against the United States, and provided a test for determining if money damages are available in such a suit. The test includes:

1) Statute providing consent to suit by the United States;

2) Substantive right to money damages must be found in some statute or regulation; and

3) Source of substantive law relied upon "can fairly be interpreted as mandating compensation" for the damages sustained. *Mitchell II*, supra, page 2967, 2968.

This case has been brought by an Indian Plaintiff, on behalf of herself and all others similarly situated, against the United States, concerning their loss of interest and rights in allotment lands.

These requirements are clearly met under 25 U.S.C. 345, which provides jurisdiction to hear claims concerning allotments brought by Indians. There is no statute of limitations and no limitations in the amount in controversy. Since 1901, the United States is required to be a party defendant in any such action and this is the only amendment to that statute. The petitioner has consented to suit under 25 U.S.C. 345. There is no dispute within the Circuit Courts of Appeal that 25 U.S.C. 345 provides jurisdiction and contains the necessary consent to bring suit against the United States. *Arenas v. United States*, 322 U.S. 419, 64 S.Ct. 1090 (1944); *Antoine v. United States*, 637 F.2d 1177, 1181 (8th Cir. 1981); *Scholder v. United States*, 428 F.2d 1123, 1125-26 (9th Cir. 1970).

The requirements are also met under 28 U.S.C. 1346 since this court has determined in *Mitchell II*, supra, page 2967, that if a claim falls within the terms of the "Tucker Act", the United States has consented to suit. Although the *Mitchell II* case was based on a Court of Claims action where the "Tucker Act" is now found at 28 U.S.C. 1491, it follows that its counterpart in the district courts, which



is now found at 28 U.S.C. 1346, would also provide jurisdiction and consent to suit.

There are other substantive laws that demonstrate a right to money damages. It is important to note that the Supreme Court in *Mitchell II* did not require that the substantive laws which a plaintiff relies on to specifically state that money damages are available but merely to "fairly be interpreted as mandating compensation", *Mitchell II*, supra, page 2968, nor do the substantive statutes have to provide a second waiver of sovereign immunity. *Mitchell II*, supra, page 2969.

Besides providing jurisdiction and the necessary consent to bring suit against the United States, 25 U.S.C. 345 can also be fairly interpreted as mandating compensation. The Act provides for actions to be brought by those "who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled". Earlier cases naturally focused on disputes concerning issuance of the allotment in the first instance since the allotment program was in the early stages of implementation. The Circuit Courts, as indicated in the following cases, are unanimous that once the allotment has been issued the language of the Act clearly permits the courts to determine not only whether or not an allottee has been deprived of an allotment but also whether or not there has been a deprivation of rights connected thereto. The monetary damage issue under a 25 U.S.C. 345 action was decided in the Indian plaintiff's favor by the Eighth Circuit Court of Appeals in *Antoine v. United States*, 637 F.2d 1177 (1981), wherein it was stated, "Moreover, the language of 25 U.S.C. 346 compels the conclusion that Congress intended to permit damage suit against the

United States under section 345". *Antoine*, supra, page 1182. A boundary dispute was involved in another Eighth Circuit case in *Fontenelle v. Omaha Tribe of Indians*, 298 F.Supp. 855 (1969). The Ninth Circuit has allowed money damages and stated that the purpose of 25 U.S.C. 345 is to "protect or preserve an allotment once issued". *Scholder v. United States*, 428 F.2d 1123, 1126 (1970), cert. denied, 400 U.S. 942 (1970). That case involved irrigation construction charges that became liens on allotment land. Also, in the same circuit, money damages were allowed for loss of rental income collected by the United States acting in their trust capacity, *United States v. Pierce*, 235 F.2d 885 (1956). See, also, in the same circuit, *Christensen v. United States*, 755 F.2d 705 (1981); *Big Spring v. United States*, 767 F.2d 614 (1985); *Sampson v. United States*, 533 F.2d 499 (1976); and *Gerard v. United States*, 167 F.2d 951 (1948).

The government's position that 25 U.S.C. 345 actions should be restricted to the issuance of allotments in the first instance is not supported by the cases that petitioner cites. In *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S.Ct. 1456 (1972), there was a finding against the Indian allottee but not because the suit involved a mineral interest dispute. The court held that the mineral interest in dispute was not appurtenant to an allotment. "Although the interest in the mineral estate.....perhaps could be made the subject of an allotment, it has never been so subjected. Nor is it appurtenant to an allotment. It remains tribal property." *Affiliated Ute Citizens*, supra, page 1467. In *First Moon v. White Tail*, 270 U.S. 243 (1926), the allottee had a valid allotment in the first place so it was not necessary for the court to question the original



allotment in a claim by another heir. Furthermore, this case dealt with property occasioned by an Indian's death and such a transfer would remove the dispute from 25 U.S.C. 345 to be handled under probate law. *United States v. Preston*, 352 F.2d 352 (1965), concerned a case brought by a non-Indian attorney for fees incurred for work done on an allotment for an Indian. The court in *Vincenti v. United States*, 470 F.2d 834 (1972) dismissed the action against the United States, but that court reasoned that the United States was an innocent party in the dispute since the government did not receive any of the lost income alleged by the allottee. The lost income had gone to a third party while they held the land.

In *Mitchell I* the United States Supreme Court held that the *General Allotment Act* provided a limited trust relationship as to the government's responsibility to manage timber on Indian allotment lands. *Mitchell I* was remanded on other grounds and the Claims Court, 664 F.2d 265 (1981), held that the United States was subject to suit under various other statutes and regulations. The defendant's Petition for Certiorari, 457 U.S. 1104 (1982), was granted and on June 27, 1983, the United States Supreme Court in *Mitchell II* held:

> "that if the "claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit." *Mitchell II*, supra, page 2967.
>
> "It nonetheless remains true that the Tucker Act "does not create any substantive right enforceable against the United States for money damages. . . A substantive right must be found in some other source of law, such as "the Constitution or any Act of Congress, or any regulation of an executive department."

> . . . The claim must be one for money damages against the United States . . . and the claimant must demonstrate that the source of substantive law he relies upon "can fairly be interpreted as mandating compensation. . ." *Mitchell II*, supra, page 2969.
>
> "Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." *Mitchell II*, supra p. 2969.

The Supreme Court in *Mitchell II* reaffirmed the existence of the trust relationship between the government and Indians, or Indian Tribes, that "includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." *Mitchell II*, supra, page 2973. The Supreme Court held that the rules and elements of a common-law trust apply:

> "All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds). Because the statutes and regulations at issue clearly establish a fiduciary obligation of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Government for damages sustained." *Mitchell II*, supra, page 2973.

The Court went on to discuss the necessary and inevitable consequences of a trust relationship and stated that if there is no liability for damages for breach of that trust, the trust itself is meaningless.



> "Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. See Restatement (Second) of the Law of Trusts, Sections 205-212 (1959); G. Bogert, The Law of Trusts & Trustees, section 862 (2d ed. 1965); 3 A. Scott, The Law of Trusts, section 205 (3d ed. 1967). This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from breach of the trust." *Mitchell II*, supra, page 2973.

*Mitchell II* has in effect decided Mottaz. The *Mitchell II* case concerned a breach of trust for mismanagement of timber lands while this case involves a breach of trust for the alienation or sale of Indian trust property which resulted in a direct benefit to the trustee. While the Court in *Mitchell II* said that the *General Allotment Act* itself did not impose any management duties on the United States, the Act does prohibit the sale or alienation of the allotted lands:

> "The trust language of the Act does not impose any fiduciary management duties or render the United States answerable for breach thereof, but only prevents improvident alienation of the allotted lands and assures their immunity from state taxation." *Mitchell II*, supra, page 2968.

If discretionary mismanagement is compensable, it follows *a fortiori* that outright sales without consents should

be compensable. Complete elimination of the trust property is a greater wrong than diminishing the value of the trust property.

In this case, the initial relationship of the United States as trustee, the Indian allottees as beneficiary, and the lands as the trust corpus is established by the *General Allotment Act of 1887* itself, and should provide an enforceable right to money damages. Furthermore, the independent provisions of 25 U.S.C. 348, 349, 354, 372, and 483, specifically establish a trust relationship and an enforceable right to money damages.

## STATUTE OF LIMITATIONS

The Eighth Circuit Court of Appeals has properly held that 28 U.S.C. 2401(a) does not apply to a void transfer of Indian trust lands under the principles enunciated in *Ewert v. Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922).

That court recognized the special trust relationship between the United States and Indian allottees by holding that the respondent's claim was not barred by the six (6) year statute (28 U.S.C. 2401(a)) "because *Ewert* is based on the principle that, if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along." *Mottaz, et al. v. United States of America*, 753 F. 2d 71, 74 (1985).

While *Ewert* did not involve a federal statute of limitations in a suit against the United States, it did involve a government agent, working on allotment transactions, who violated a statutory provision that no government employer should have any interest or concern with the Indian and



his or her allotment. This court in *United States v. Hutto*, 256 U.S. 524, 41 S.Ct. 541 (1921), noted that the purpose of the *Ewert* statute was "to protect the inexperienced, dependent, and improvident Indians from the avarice and cunning unscrupulous men in official position, and . . . to prevent officials . . . to speculate on what inexperience or upon the necessities and weaknesses of these wards of the nation."

In *Ewert* a public official was not allowed to hide behind the shield of a statute of limitations. There was also no expressed trust relationship with the Indian in that case. In Mottaz, there is a breach of an expressed trust created under the *General Allotment Act of 1887* with the United States as trustee, the Indian allottees as beneficiaries, and the land as the trust corpus. In Mottaz, the trustee not only sold the trust property without the application or consent of the Indian owners but also benefited from the sale because it sold to itself. It should not be allowed to hide behind the statute of limitations in this case.

The General Allotment Act of 1887 contains a clear expressed trust within Section 5 of the Act, providing that title to allotments are to be held in trust by the United States. This distinguishes the Mottaz case from the holding against the Indians in *Menominee Tribe v. United States*, 726 F.2d 718, cert. denied, 105 S.Ct. 106 (1984), in which the court noted that there was no express trust in that case. See also *Mitchell II*, supra, page 2973, reaffirming the existence of the trust relationship between the government and the Indians where statutes clearly establish a fiduciary obligation.

In *Ewert*, the court quoted the following general rule from *Waskey v. Hammer*, 223 U.S. 85, 94 (1912):

> "The general rule is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer;"

Courts have looked with disfavor on situations where the trustee has been the beneficiary of the transaction noting the inherent conflict of interest. *Navaho Tribe of Indians v. United States*, 364 F.2d 320 (1966); and *Coast Indian Community v. United States*, 550 F.2d 639 (1977). See also, 3A Scott, *The Law of Trust*, section 170.1, which suggests that such a sale might be void.

Further support for the Eighth Circuit holding can be found in *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F.Supp. 1233, 1249 (1973), a case of mismanagement of Indian trust funds by the United States. There the court struck down a defense of the statute of limitations because a statute does not run against a beneficiary in favor of the trustee until the trust is repudiated and terminated. There are also a line of tax cases holding that a federal tax statute of limitations does not apply to income from Indian trust property. *Clark v. United States*, 587 F.2d 465 (1978); *Dodge v. United States*, 362 F.2d 810 (1966); *Daney v. United States*, 247 F.Supp. 533 (1965), affirmed 370 F.2d 791 (1966); and *Nash v. Wiseman*, 227 F.Supp. 552 (1963).

*Begay v. Albers*, 721 F.2d 1274 (1983), involved forgeries on Indian deeds where there was no consent from the Indians. The court held:

> "The forgeries rendered the deeds null and void. Without the consent of Begay and Mrs. Cecil Navaio to the conveyances, there was no termination of the trust relationship between the United States and these Indian wards" *Begay*, supra at 1281.



The argument in the Begay case was that the approval of the forged deeds by the Secretary of the Interior terminated the trust status. The 10th Circuit Court of Appeals specifically rejected that argument and held that the void deeds did not transfer anything and that the property still remained in the name of the Indian allottees. It is of interest to note that the Begay case also involved third parties who had held that land since 1946. In spite of that period of time, there was no statute of limitations discussion in the case. The court further held that 25 U.S.C. § 345 is not limited to the issuance of an allotment only.

"Thus, 25 U.S.C. § 345 is not limited, as appellants urge, to actions filed to compel the issuance of an allotment. The statute does, in the language of *Scholder v. United States*, 428 F.2d 1123, 1129 (9th Cir. 1970), serve "[a]lso to protect 'the interests and rights of the Indian and his allotment or patent after he has acquired it.' *Accord: Loring v. United States*, 610 F.2d 649 (9th Cir. 1979); *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (8th Cir. 1970); *United States v. Pierce*, 235 F.2d 885 (9th Cir. 1956); *Gerard v. United States*, 167 F.2d 951 (9th Cir. 1948)."

The United States miscites *Affiliated Ute Citizens of the State of Utah v. United States*, 406 U.S. 128, 92 S.Ct. 1456 (1972), as authority for overruling the 8th, 9th and 10th Circuits which have allowed allotment actions under 25 U.S.C. § 345. All that Affiliated Ute held was that mineral interests were not part of the allotment and that therefore 25 U.S.C. § 345 would not apply to the mineral interests. In that case, Congress had passed a law giving the mineral rights to the *tribe*. If that had not been done, then the mineral rights would have been appurtenant to the allotment and it would have been a different result.

Petitioner has erroneously expressed concern that the Eighth Circuit's holding in Mottaz is in direct conflict with the Court of Claims position on Indian claims and the application of the statute of limitations. None of the cases cited by the United States have rejected the proposition that the existence of a fiduciary or trust relationship between the United States and the Indians would render the statute of limitations inapplicable. In *Menominee Tribe v. United States*, 726 F.2d 718, 722 (1984), cert. denied 105 S.Ct. 106 (1984), the court noted that there was no expressed trust involved in the case. It indicated that the ruling might be different if an expressed trust was present. In Mottaz, of course, there is obviously an expressed trust.

Petitioner cited *Hydaburg Cooperative Association v. United States*, 667 F.2d 64 (1981). However, in that case, the allotment lands were not at issue, and there was no fiduciary obligation over the funds once issued. *Capoeman v. United States*, 440 F.2d 1002 (1971) involved a dispute over administrative charges which were allowed by statute at the time the charges were made. In other words, plaintiff had no right to the money in the first place. In *Andrade v. United States*, 485 F.2d 660 (1973), cert. denied, 419 U.S. 831 (1974), the Indian plaintiff attempted to overturn a prior judgment that had been entered where he had notice and legal representation in the original proceeding.

Furthermore, the Court of Claims does not have jurisdiction over 25 U.S.C. 345 claims. Original jurisdiction is in the District Court, and there are no jurisdictional limitations. Clearly, the Eighth Circuit's holding in Mottaz is not in conflict with the Court of Claims.

The petitioner discusses *Christensen v. United States*, 755 F.2d 705 (1985), a Ninth Circuit decision. We see no conflict with Mottaz. That court applied a statute of limitations to a dispute over access to an allotment. *Loring v. United States*, 610 F.2d 649 (9th Cir. 1979) was a right-of-way case. Mottaz involves a void *sale* of trust lands. The *Christensen* court apparently felt compelled to follow another Ninth Circuit decision, *Loring*, supra. This was a confusing case where the plaintiffs never alleged federal jurisdiction under 25 U.S.C. 345. It may well be that if the *Loring* case had been argued from the start as a 25 U.S.C. 345 case rather than as an ordinary civil action, the court would have reached a different result. In *Vincenti v. United States*, 470 F.2d 845 (10th Cir. 1972), the statute of limitations was raised as a defense but the court held against the Indian plaintiff on other grounds. *Big Spring v. United States*, 767 F.2d 614 (1985), was a case involving the reservation of mineral rights to the tribe rather than being included in the allotment to individual Indians. In that case, the Ninth Circuit Court of Appeals in Footnote No. 1 specifically stated that *Big Spring* was not in conflict with the Eighth Circuit's holding in *Mottaz* because of the completely different facts involved in the two cases.



Petitioner also raises the Quiet Title Act of 1972, 28 U.S.C. 2409 a(f). This does not seem to make any serious difference concerning the statute of limitations issue. The Eighth Circuit Court of Appeals held that the six (6) year statute "does not bar claims of title to allotments because *Ewert* is based on the principle that, if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along". This analysis would, of course, apply to a 12 year statute of limitations as well as a six (6) year statute of limitations. Also, the Quiet Title

Act only applied to those that are relying on the waiver of sovereign immunity contained in that Act. In this case, Mottaz is relying on 25 U.S.C. 345. In addition, 2409 a(a) specifically states that: "This section does *not* apply to trust or restricted Indian Lands. . ." (Emphasis added). Inasmuch as this is obviously trust land, it seems clear that the Quiet Title Act would not apply. *Spaeth v. United States Secretary of the Interior, et al.*, 757 F.2d 937 (8th Circuit. 1985) establishes that if there is "a substantial possibility that the lands in question are trust or restricted Indian lands" then the exception for Indian trust lands contained in the Quiet Title Act make it inapplicable. This is also the reason that *Block v. North Dakota*, 461 U.S. 273 (1983), does not apply. That case involved a claim to a river bed by the State of North Dakota against the United States. Mottaz involves a specific allotment that was granted by the United States, held in trust by them as a trustee, and then transferred to itself without the consent of the heirs and without a court hearing and determination.

The American Land Title Association (ALTA) in its amicus brief deals with bona fide purchasers of real estate. In other words, those cases deal with innocent purchasers of Indian land and the rights of those innocent third party purchasers against an Indian who is now asserting title to the land. This is one of the primary reasons why, in this yet uncertified class action, we dismissed without prejudice our claim for actual return of the land. To proceed otherwise would involve many innocent third parties and would make the case difficult, if not impossible, to handle as a class action. In the present posture we feel the United States has an opportunity and, in fact, a duty



to both compensate the people whose land it sold without their consent and without a court hearing, and to protect innocent bona fide purchasers that may have possession of the land under some claim of title. The ALTA brief cites *Joines v. Patterson*, 274 U.S. 544 (1927), in support of its argument. However, in that case there were court proceedings involving the land. The parties went into court and had a guardian appointed. They later petitioned the court for sale of the land and the court authorized the sale. In other words, an important element of our jurisprudence was present in the *Joines* case but is not present in the *Mottaz* case, namely, a court hearing and determination.

Additional support for not applying the statute of limitations include the following:

## STATUTE OF LIMITATIONS, 28 U.S.C. 2401 (a), DOES NOT APPLY TO INDIAN LAND ALLOTMENTS STATUTE 25 U.S.C. 345

### A. THE ORIGIN AND HISTORY OF 28 U.S.C. 2401 (a), CLEARLY SHOW THAT IT WAS NOT INTENDED TO APPLY TO 25 U.S.C. 345 ACTIONS.

A review of the origins of 28 U.S.C. 2401(a) *conclusively* shows that this statute was never intended to apply to 25 U.S.C. 345 actions. 28 U.S.C. 2401(a), a general statute of limitations, was enacted in 1948, c. 646. 62 stat. 971, and was originally part of 41(20) of Title 28 of the 1940 Code. The relevant language of 41(20) in the 1940 Code was the same in the 1926 Code and in the 1911 codification of the Judicial Code where it originated, c. 231, section 24, 36 Stat. 1093. 41(20) of Title 28 was *not a*

*general statute of limitations*, but rather a *jurisdictional* statute that contained a *statute of limitations*, which stated that it was applicable to the actions enumerated within 41(20). There can be no question that when 41 (20) was enacted it did *not* pertain to actions brought under 25 U.S.C. 345, because that type of claim was and still is authorized under an entirely different provision of the law.

During the recodification of the Judicial Code in 1948, 41(20) of Title 28, the subject matter jurisdiction and the statute of limitations pertaining to those enumerated claims were divided, with subject matter jurisdiction now codified at 28 U.S.C. 1346, and the statute of limitations now codified at 28 U.S.C. 2401.

There is no evidence that Congress intended any changes in the substantive provision of the law as it existed prior to 1948. Therefore, 28 U.S.C. 2401 cannot be interpreted as an expansion of the six year statute of limitations to include Indian allotment actions brought under 25 U.S.C. 345.

No legislative history discloses any such intention in 1948, and none could be found in the amendments to 28 U.S.C. 2401 in 1949, 1959, 1966, and 1978. Furthermore, the Chief Revisor of the Judicial Code, Title 28, stated in an article written shortly after the 1948 revisions, Barron, *The Judicial Code*, 8 F.R.D. 439, 445-46 (1949):

> "Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments *no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.*



> Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.
>
> Congress recognized this rule by including in its reports the complete Revisor's Notes to each section in which are noted all instances where change is intended and the reason therefor." (Emphasis supplied).

A review of the Revisor's Notes finds no such express intent to place a limitation on Indian allotment actions under 28 U.S.C. 2401(a).

Furthermore, the general rule of law of statutory revisions is that "unless such intention is clearly expressed" no changes of law or policy can be presumed. *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199, 32 S.Ct. 626 (1912); *United States v. Ryder*, 110 U.S. 729, 4 S.Ct. 196 (1884); and *McDonald v. Hovey*, 110 U.S. 619, 4 S.Ct. 142, 146 (1884). In *McDonald*, supra, the Supreme Court ruled on an issue similar to Mottaz, namely whether a revised statute concerning limitations on actions was intended as an expansion of its previous meaning and construction. The Court held that such a revision cannot change its meaning unless there is clear evidence that Congress intended to change it:

> "So upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedg. Const. St. 365. As said by the New York Court for the correction of errors, in *Taylor v. Delancy*, 2 Caines. Cas. 150: "Where the law antecedently to the revision was settled, either by clear ex-

> pressions in the statutes or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of law unless such phraseology evidently purports an intention in the legislature to work a change' ". (*McDonald*, supra, at page 146).

In short, former section 41(20) of Title 28 pertained only to actions enumerated within that statute, while actions involving Indians and their allotment lands were authorized under an entirely different statute, 25 U.S.C. 345. Secondly, the terms of neither statute, 41(20) nor 25 U.S.C. 345, nor the Revisor's Notes to 28 U.S.C. 2401, nor the legislative history indicate an intention to place a new limitation on actions under 25 U.S.C. 345. No limitation existed prior to the 1948 recodification, and there is no *clearly expressed intention* in the 1948 Revised Code to place this statute of limitations on claims under 25 U.S.C. 345. Therefore, 28 U.S.C. 2401(a) does not apply to 345 actions.

### B. THE GENERAL STATUTE OF LIMITATIONS 28 U.S.C. 2401 (a) DOES NOT APPLY TO SPECIFIC INDIAN LAND ALLOTMENT ACTIONS UNDER 25 U.S.C. 345, SINCE A GENERAL LAW IS NOT DESIGNED TO LIMIT SPECIFIC RIGHTS OR GRANTS.

The courts have historically given favorable construction to specific Indian statutes. In *Antoine v. United States*, 637 F.2d 1177 (1981), the Eighth Circuit Court of Appeals, in a 25 U.S.C. 345 claim for money damages, states:

> "We first emphasize that a statute designed to safeguard the rights of Indians is to be broadly interpreted so as to give the Indians the maximum protection possible under the language of the enactment." (*Antoine*, supra, at page 1179).



In *United States v. Kagama*, 118 U.S. 375 (1886), the court stated that "[t]hese Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . From their very weakness and helplessness . . there arises the duty of protection, and with it the power." In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the court said, when referring to Indian tribes that "their relation to the United States resembles that of a ward to his guardian." *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 615 (1956), concerned the application of income tax consequences to trust property. The court noted at that time that statutes relating to Indians are: "to be resolved in favor of the weak and defenseless people who are wards of the nation dependent upon its protection and good faith".

Ordinary rules of statutory construction support the position that, a general law will not affect special acts unless it is clearly expressed. The Eighth Circuit Court of Appeals in *Hemmer v. United States*, 204 F.2d 898, 906 (1916), noted that:

> "Privileges granted to a certain class by special act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But the special act and the general law stand together, the one as the law of the particular class and the other as the general rule."

When dealing with special rights granted to Indians, the courts have held that "General Acts of Congress did not

apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Elk v. Wilkins,* 112 U.S. 94, 5 S.Ct. 41, 44 (1884). This principle has not been rejected by the Supreme Court in *F.P.C. v. Tuscarora Indian Nation,* 362 U.S. 99 (1960). The land in dispute in the *Tuscarora* case was held by the Indians in *fee* not by the government in *trust*. This important distinction was noted in a Ninth Circuit decision. *United States v. Truckee-Carson Irrigation District, State of Nevada,* 649 F.2d 1286, 1298 (1981). For a reaffirmance and a detailed analysis of the court's application of these rules of construction, see Cohen, *Handbook of Federal Indian Law,* (1982 ed.) pages 282-286.

25 U.S.C. 345 was enacted in 1894, c. 290, section 1, 28 Stat. 305, and amended in 1901, c. 217, section 1, 31 Stat. 760, and 1911, c. 231, section 291, 36 Stat. 1167, and to this day contains no expressed time limitations. There is nothing in the legislative history of 25 U.S.C. 345 that indicated any intention by Congress to imply a statute of limitations within the act. This act is a special right granted by Congress and a general statute of limitations should not apply to it.

### C. CONGRESS HAS EXPRESSED AN INTENT IN 28 U.S.C. 2415 AND THE INDIAN CLAIMS ACT OF 1982 THAT THESE ACTIONS NOT BE BARRED.

The background behind 28 U.S.C. 2415 is set forth in *Covelo Indian Community v. Watt,* 551 F.Supp. 366 (D.C.C. 1982). In summary, prior to 1966, there was no general statute of limitations applicable to the United States as plaintiff in cases seeking money damages against third parties. In 1966, Congress sought to correct this perceived



inequity by passing the statute of limitations contained in 25 U.S.C. 2415. §2415(c) specifically provides that no time limits were placed on actions "to establish the title to, or rights of possession of, real or personal property." Under §2415, actions accruing prior to July 18, 1966 were deemed to have accrued on that date.

In late 1971, as the initial six year period drew to a close, Indians and government officials became concerned that pre-1966 claims might be extinguished with the running of the statute of limitations on July 18, 1972, unless the federal government took action to identify, evaluate, and where appropriate, file lawsuits to assert those Indian claims. The Department of Interior ardently supported an extension of the statute of limitations for pre-1966 Indian claims so that claims could be identified and filed. 118 Cong. Rec. 28117 (August 14, 1972), reprinted in (1972) U.S. Code Cong. & Ad News 3592, 3595. Consequently, in 1972, Congress extended the time in which the United States could assert pre-1966 claims on behalf of Indians to July 18, 1977. P.L. 92-485, 86 Stat. 803 (Oct. 13, 1972).

Once again in 1977, at the urging of the Department of Interior and the Department of Justice, Congress extended the federal statute of limitations insofar as it applied to actions for money damages brought by the United States on behalf of Indians with pre-1966 claims. P.L. 95-103, 91 Stat. 842 (August 15, 1977).

On March 27, 1980 the time was extended until December 31, 1982. Then, largely in response to *Covelo,* supra, in which the inadequacies of the federal government's claims identification program were exposed, and, in conjunction with a strong lobbying effort, the Indian Claims Act of 1982, 96 Stat. 1976 was passed extending the time

period again for a period of one year if Congress publishes a notice rejecting such claims or three years if a legislative solution is proposed.

Approximately 4,683 title claims (secretarial transfers such as the one here and forced fees) were identified under the Statute of Limitations Project. Many more were called to the attention of the government and placed on a second list published on November 7, 1983. Federal Register Vol. 48, No. 216, pp. 51, 204-51, 268. As stated previously, a common factor among these title claims is federal complicity. If 25 U.S.C. 345 is ultimately determined to be the exclusive remedy for actions on allotments and/or if the United States is viewed as indispensable to such actions even where suit is brought against third parties to recover the land (points not conceded but nevertheless issues which have been raised as defenses in South Dakota) and if 28 U.S.C. 2401 is held to apply to all causes of action against the United States, then 28 U.S.C. 2415 would be useless as to a substantial portion of the most important claims. This would directly frustrate the federal policy expressed in that act of allowing the claims covered by the act to be brought so long as the time limits therein are observed.



## CONCLUSION

The undisputed evidence in this case indicates a systematic deprivation of the property rights of the individual members of this class consisting of heirs and assignees of the original Indian allottees. The United States had a fiduciary duty to protect this land and not to transfer it without the consent of the Indians or without a court hearing and due process of law. If relief is not granted to this class of victims in this type of class action, there is no other adequate remedy available to right these wrongs and a massive injustice will occur. In short, there will be a wrong without a remedy for thousands of innocent people who placed their trust in the United States. We feel that the Eighth Circuit Court of Appeals recognized this problem and used the principle enunciated in *Ewert v. Bluejacket*, 259 U.S. 129 (1922), that a void transfer of restricted allotments does not transfer title and that the allottee or heirs should not be barred by statutes of limitation, to prevent the massive injustice that would result from a contrary holding. Furthermore, this is a 25 U.S.C. 345 case and there is, therefore, no statute of limitations that applies. The Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

DERCK AMERMAN
LEONARD A. ZOLNA, JR.
*Attorneys for Respondents*
2408 Central Avenue N.E.
Minneapolis, MN 55418
(612) 789-8805

## APPENDIX A

Additional Statutory Provisions Involved:

1. 28 U.S.C. 41(20), Predecessor Statute to Section 2401 (a), prior to recodification

*Suits against United States.*

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. Nothing in this paragraph shall be construed as giving to

either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the Civil War, and commonly known as "war claims", or to hear and determine other claims which had been rejected or reported on adversely prior to the 3d day of March 1887 by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions, or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof: but no suit pending on the 27th day of June 1898 shall abate or be affected by this provision. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (Mar. 3, 1911, ch. 231, §24, par. 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, §1310(c), 42 Stat. 311; June 2, 1924, 4:01 p.m., ch. 234, §1025 (c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972. Feb. 26, 1926, ch. 27, §§1122(c), 1200, 44 Stat. 121, 125.)

(10)

No. 85-546



# In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

*v.*

FLORENCE BLACKETTER MOTTAZ, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

2-1-86

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# In the Supreme Court of the United States

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## REPLY BRIEF FOR THE UNITED STATES

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Respondent had notice in 1954 of the sale of the three allotments in which she held an interest, and the listing of her holdings the BIA furnished in 1967 confirmed that the United States no longer held those interests in trust for her. As we have demonstrated in our opening brief, respondent's suit, which was filed 27 years after the sale of the parcels, is barred by the statute of limitations.

In arguing that this suit is not barred, respondent proceeds as if it already has been established that the sale of the allotments in 1954 was unlawful. See Resp. Br. 5-6. However, because the district court granted the United States' motion for summary judgment on statute of limitations grounds (Pet. App. 9a-11a), neither court below had occasion to consider the merits of respondent's claim (*id.* at 4a). Thus, although respondent asserts (Br. 5-6) that none of the heirs requested that the allotments in question be sold and

that she did not receive payment for her interests in them, there has not yet been any occasion for the government to introduce evidence on those issues.[1] Nevertheless, respondent did stipulate in district court that each of the three allotments was sold with the express consent of some of the heirs (J.A. 13), and the record establishes that respondent herself received notice of the impending sales in 1953 and failed to object to them, despite being informed by the BIA that such a failure would be deemed to constitute consent to the sale (J.A. 15-16). This case therefore does not involve an instance in which BIA unilaterally disposed of assets that were held in trust for an Indian.

In any event, the arguments in respondent's brief for avoiding the statute of limitations are without merit under any of the three possible theories of this suit—*i.e.*, whether it is characterized as (a) an action to establish that she, rather than the United States, has the equitable title to the interests she formerly had in the parcels; (b) an action to recover damages for an allegedly illegal sale of those interests in 1954; or (c) a suit for an allotment under 25 U.S.C. 345 and 28 U.S.C. 1353.

A

Respondent insists that at no time in this case has she abandoned her claim of title to the parcels and that, "[t]o the contrary, the claim for title is the essence and bottom line of respondent's case" (Br. 3). Respondent explains her request for damages in the amount of the current fair market value of her interests as merely an "election of

[1]It might frequently be difficult to produce records of such payments and consents many years after the transactions, and indeed it is one of the purposes of statutes of limitations to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).



remedies" (Br. 3, 4)—a demand for money in lieu of the return of the property itself because the land is situated within the Chippewa National Forest and is not readily accessible. In other words, respondent disputes the United States' claim of title to the three parcels as part of the Chippewa National Forest, and she seeks to establish in this suit that she retains a beneficial interest in them. This case therefore necessarily arises under the Quiet Title Act (QTA), 28 U.S.C. 2409a, and it is barred by the 12-year statute of limitations for QTA suits (28 U.S.C. 2409a(f)). Moreover, the QTA does not afford the plaintiff, such as respondent, the right to elect a monetary remedy in lieu of the return of the property. Under 28 U.S.C. 2409a(b), the right to elect between the return of the property and the payment of its value is reserved exclusively to the United States. See U.S. Br. 25-26.

1. In the QTA, Congress consented to the naming of the United States as a defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. 2409a(a).[2] This Court held in *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983), that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." The QTA therefore is the exclusive means by which an individual Indian or an Indian tribe may bring an action to challenge the United States' title to real property, whether the Indian plaintiff claims the fee title or only a beneficial interest.

[2]Security interests and water rights were excluded because Congress previously had consented to suit under 28 U.S.C. 2410 and 43 U.S.C. 666 (the McCarrran Amendment) where such interests claimed by the United States are involved. See H.R. Rep. 92-1559, 92d Cong., 2d Sess. 10 (1972).

Respondent argues (Br. 21-22), however, that the QTA is inapplicable to this suit by virtue of the second sentence of 28 U.S.C. 2409a(a), which states (emphasis added):

> *This section does not apply to trust or restricted Indian lands,* nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

Respondent asserts that this case falls within the emphasized exception because, in her view, the three parcels in question are "obviously trust land" (Br. 22). But that assertion of course begs the very question that would have to be decided on the merits of this case if it were not barred by the statute of limitations. In resolving the distinct, threshold question whether the QTA applies, or whether this case instead falls within the exception to the QTA for cases involving Indian lands, it is necessary to look to the nature of the interest the United States *claims* in the land, not the interest (if any) that the plaintiff believes that the United States should claim or actually has. This interpretation is confirmed by the first sentence of 28 U.S.C. 2409a(a), which authorizes suits "to adjudicate a disputed title to real property in which the United States *claims an interest*" (emphasis added).[3] In this case, the United States claims an interest in the three parcels in its own right, for purposes of including them in the Chippewa National Forest, not in a

[3]The fact that jurisdiction under the QTA turns on the interest the United States claims also is supported by 28 U.S.C. 2409a(d), which provides that "[i]f the United States disclaims all interest in the real property or interest therein adverse to the plaintiff," and if the disclaimer is confirmed by court order, the jurisdiction of the district court under the QTA shall cease.



capactity as trustee for the heirs of the original Indian allottees.[4]

The legislative history of the QTA also confirms this interpretation. The committee reports state that the exception was intended to exclude "lands held in trust for Indians." S. Rep. 92-575, 92d Cong., 1st Sess. 2, 4 (1971); H.R. Rep. 92-1559, 92d Cong., 2d Sess. 13 (1972). But, as we have said, the three parcels are not now "held in trust for Indians"; rather, respondent contends in this suit that they *should* be so held. Moreover, the legislative history makes clear that the exception was intended to protect against suits by third parties where the interests of the United States and those of the Indians are aligned as potential defendants with respect to a particular parcel of land, in order to ensure that "trust and restricted Indian lands are specifically protected from *challenge*" (S. Rep. 92-575, *supra,* at 6 (emphasis added); H.R. Rep. 92-1559, *supra,* at 10). The purpose was to prevent a "unilateral waiver [by the United States] of the defense of sovereign imunity" in such circumstances, and thereby to preserve the commitments the United States has made to the Indians with respect to lands it holds in trust. *Dispute of Titles on Public Lands: Hearing on S.216, S. 579 and S. 721 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs,* 92d Cong., 1st Sess. 19 (1971). See also H.R. Rep. 92-1559, *supra,* at 10; *Block* v. *North Dakota,* 461 U.S. at 283, 285. By contrast, there is no indication in the legislative history

[4]By contrast, in *Spaeth* v. *Secretary of the Interior,* 757 F.2d 937 (8th Cir. 1985), upon which respondent relies (Br. 22), the United States' claim to the land was based on the position that it was "trust or restricted Indian land[]" within the meaning of 28 U.S.C. 2409a; the United States was not claiming the lands in its own right, as in the instant case. See 757 F.2d at 942-943. Moreover, *Spaeth* was a suit by a third party seeking to quiet his title to the land that the United States claimed on behalf of Indians; it was not, as here, a suit brought by an Indian to dispute the United States' claim of title.

that the exception was intended to apply where there is a dispute between the United States and Indians over title to a particular parcel of land and the Indian appears as a plaintiff in the suit. Compare *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138, 147-151 (1984). If the exception were construed to apply in such a situation, Indians would have no way at all to settle land disputes with the United States, since the QTA is the exclusive means for resolving such disputes. Respondent has not suggested any reason why Congress would have wanted to exclude Indians from the remedy it afforded all other claimants when it enacted the QTA.

In fact, the legislative history makes clear that Congress did not intend that anomalous result. The bill proposed by the Department of Justice, after which the QTA as finally enacted was patterned, contained the exception for "trust or restricted Indian lands." See S. Rep. 92-575, *supra*, at 7. However, the Senate Committee on Interior and Insular Affairs expanded that provision to exclude as well " 'any lands *claimed* by Indian or Native people based upon aboriginal right, title, use or occupancy" " (*id.* at 2 (emphasis added)). The bill passed the Senate in that form. See 117 Cong. Rec. 46380 (1971). In testimony during the House hearings, the Assistant Attorney General for the Land and Natural Resources Division recommended that the latter provision be stricken, explaining:

> It is not clear whether the purpose of this additional exception is to protect "Indian or Native people" from suits by others or whether it is to protect the United States from suits by "Indian or Native people." Whatever the purpose, it does appear that it might have the latter effect, and we wish to note that it is not the intention of this Department, in proposing legislation consenting to suits against the United States, to bar suits by Indian or Native people asserting claims based upon aboriginal right, title, use or occupancy.



*Disputed Land Titles: Hearings on S. 216 and Related Bills Before Subcomm. No. 2 of the House Judiciary Comm.*, 92d Cong.; 2d Sess. 56 (1972); see also *id.* at 52.[5] In accordance with the Justice Department's recommendation, the Judiciary Committee deleted the additional exclusion added by the Senate for lands "claimed" by Indians (H.R. Rep. 92-1559, *supra*, at 1; 118 Cong. Rec. 35530 (1972)), and the QTA, as finally enacted, contains only the narrower exception for "trust or restricted Indian lands." 28 U.S.C. 2409a(a). This sequence of events confirms what is evident from the text and structure of the QTA and from the other legislative history, discussed above: that the QTA grants consent to suits brought by Indians to resolve disputed questions of title to land in which the United States claims an interest.

2. Because this suit arises under the QTA, it is subject to the statute of limitations in 28 U.S.C. 2409a(f). That restriction is a condition on Congress's waiver of sovereign immunity, and it must be strictly applied. *Block* v. *North Dakota*, 461 U.S. at 287. Subsection (f) provides that "[a]ny civil action under [the QTA] shall be barred unless it is commenced within twelve years of the date upon which it accrued" (emphasis added). There is no exception to this limitation for civil actions brought by Indians, just as there is none for actions brought by States. 461 U.S. at 287-290. Section 2409a(f) provides that an action "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." The district court found that respondent knew of the sale of the three allotments in 1954 (Pet. App.

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[5]The transcript of the House hearings on the QTA was released by the Committee in 1978. Although the transcript therefore is not printed and bound with the transcripts of the other hearings conducted by the Committee during the 92d Congress, it is available on microfiche through the Congressional Information Service, Serial No. H521-37.

10a). Her cause of action under the QTA therefore "accrued" in 1954, and it was barred long before she filed this suit in 1981.[6]

3. Respondent contends (Br. 18-19, 21-22) that this case arises under 25 U.S.C. 345, not the QTA. As we explain below (see pages 15-18, *infra*), Section 345 was not intended to suits against the United States in connection with the management or disposition of land after it was properly allotted in the first instance. But even if there once was a basis for such a suit under 25 U.S.C. 345 and its jurisdictional counterpart in 28 U.S.C. 1353, that basis has now been displaced by the QTA. Congress intended the QTA to be the exclusive means by which a plaintiff could challenge the United States' title to real property, except where the QTA itself *expressly* preserves other statutory provisions for such suits. In the second sentence of 28 U.S.C. 2409a(a), Congress provided that the QTA "does [not] apply to or affect actions which may be or could have been brought" under 28 U.S.C. 1346, 1347, 1491 and 2410; the lien provision of the Internal Revenue Code; and the McCarran Amendment, 43 U.S.C. 666. Congress did not include actions under 25 U.S.C. 345 and 28 U.S.C. 1353 among those that were unaffected by the enactment of the QTA. That omission in this "precisely drawn, detailed statute" (*Block* v. *North Dakota,* 461 U.S. at 285) reinforces the conclusion that Congress foreclosed suits by Indians against the United States under 25 U.S.C. 345 and 28 U.S.C. 1353 to challenge the United States' title to land. See, *e.g., United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

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[6]The running of the limitations period under 28 U.S.C. 2409a(f) did not result in a transfer to the United States of any title respondent might have to the interests in the former allotments. See *Block* v. *North Dakota,* 461 U.S. at 291-292. As a result, if respondent's claim was valid before that limitations period expired, it remains valid today. Section 2409a(f) forecloses only a particular remedy.



In this respect, the instant case is directly analogous to *Block* v. *North Dakota, supra.* There, the Court noted that there might have been some uncertainty prior to enactment of the QTA with respect to whether the United States' title to property could be challenged in a suit brought against the federal officer charged with supervision of the disputed area. 461 U.S. at 281-282. But the Court declined to consider whether that theory had merit, because the QTA was intended to be the exclusive vehicle for such suits and accordingly had eliminated any viability a suit against the officier might have had for that purpose. *Id.* at 282-286. That same reasoning applies here.

B

Respondent argues (Br. 9-16) that the district court had jurisdiction over this suit under the Tucker Act, 28 U.S.C. 1346(a)(2), insofar as she seeks money damages for the allegedly unlawful sale of her interests in the three allotments in 1954. We agree that the Tucker Act furnishes the basis for jurisdiction over a damage action such as this—although, as respondent concedes (Br. 9-11), in order to recover, she would be required to demonstrate that the 1954 sale violated a statutory duty of BIA and that the statute upon which she relies can fairly be interpreted as mandating compensation for the damages sustained. *United States* v. *Mitchell (Mitchell II),* 463 U.S. 206, 217 (1983); *United States* v. *Testan,* 424 U.S. 392, 400 (1976).[7]

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[7]The theory of such a suit is different from that discussed in Point A. There we address respondent's argument that she is entitled to a money judgment in the amount of the *current* fair market value of the land as a substitute for the return of the land itself. Under the theory discussed in this Point B, respondent apparently would accept the 1954 sale as a fait accompli for present purposes, and seek a money judgment to compensate her for the injury she suffered in 1954 because of the allegedly unauthorized sale. Under this theory, damages would be measured not by the current value of the interests respondent had in the three parcels (as respondent seeks in the complaint (J.A. 10)), but by the loss she

There is no need to consider the merits of her claim, however, because this suit is time-barred under 28 U.S.C. 2401(a) insofar as it arises under the Tucker Act. Section 2401(a) provides, with one exception not relevant here, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Respondent's cause of action first accrued in 1954, when she had notice of the sale of the three allotments by BIA. See *United States* v. *Kubrick*, 444 U.S. 111, 120 (1979). This suit was commenced in 1981, far more than six years later, and it therefore is barred.

Respondent concedes (Br. 16-17) that this six-year statute of limitations in 28 U.S.C. 2401(a) applies to Tucker Act suits in district court as a general matter. She argues (Resp. Br. 18, 20), however, that Section 2401(a) should not be construed to bar a suit brought by an Indian with respect to property that was once held in trust. This argument is without merit.[8] Section 2401(a) applies to "*every civil action*" commenced against the United States (emphasis added). It contains no exception for suits by Indians in relation to trust property. The only exception, which has no

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suffered in 1954—which presumably would be the value of those interests when the three parcels were sold, less the amount that she received (or that was paid into her trust account) for those interests in 1954.

[8]Respondent also defends (Br. 16-18) the court of appeals' holding that, under *Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922), no cause of action "accrues," and that the statute of limitations therefore does not begin to run, where the underlying transaction allegedly was void. We have explained in our opening brief (U.S. Br. 16-21) that this holding was clearly wrong, and respondent has not advanced any new arguments in support of it. The holding in *Ewert* v. *Bluejacket, supra*, that the state statute of limitations was inapplicable turned on the Supremacy Clause. See *County of Oneida* v. *Oneida Indian Nation (Oneida II)*, No. 83-1065 (Mar. 4, 1985), slip op. 13 n.13. Neither *Ewert* v. *Bluejacket, supra*, nor *Oneida II* furnishes any basis for avoiding the explicit *federal* statute of limitations applicable to suits against the *United States*.



application here, is for a person who was "under legal disability or beyond the seas" when the cause of action accrued (*ibid.*). Congress's provision for this one exception strongly indicates that no other exceptions from the all-inclusive language of Section 2401(a) should be implied.

Moreover, as we have shown in our opening brief (U.S. Br. 29-31), the legislative history of 28 U.S.C. 1505, which extended Tucker Act jurisdiction to suits brought by Indian tribes, demonstrates that Congress intended suits by Indians to be subject to the same defenses and limitations—including the statute of limitations—as Tucker Act suits brought by other claimants. See also *United States* v. *Mitchell (Mitchell I)*, 445 U.S. 535, 539 (1980). Accordingly, the Court of Claims and the Federal Circuit consistently have held that the six-year statute of limitations in 28 U.S.C. 2501 is applicable to Tucker Act suits brought by Indians or Indian tribes, even where there is a "trust" relationship between the United States and the Indians concerned. See, *e.g.*, *Menominee Tribe* v. *United States*, 726 F.2d 718, 721-722 (Fed. Cir. 1984), cert. denied, No. 83-1922 (Oct. 1, 1984); *Fort Mojave Tribe* v. *United States*, 210 Ct. Cl. 727, 728 (1976); *Andrade* v. *United States*, 485 F.2d 660, 664 (Ct. Cl. 1973), cert. denied, 419 U.S. 831 (1974); *Capoeman* v. *United States*, 440 F.2d 1002 (Ct. Cl. 1971). Nor has an exception for such situations been recognized by other courts of appeals under 28 U.S.C. 2401(a). See *Loring* v. *United States*, 610 F.2d 649, 650 (9th Cir. 1979); *Christensen* v. *United States*, 755 F.2d 705, 706-707 (9th Cir. 1985), petition for cert. pending, No. 85-372; *Big Spring* v. *United States Bureau of Indian Affairs*, 767 F.2d 614, 616-617 (9th Cir. 1985), petition for cert. pending, No. 85-1380.

Respondent nevertheless contends (Br. 18, 20) that the statute of limitations in 28 U.S.C. 2401(a) should not be construed to apply to a suit by an Indian where there is an

"express trust." However, that the relationship between the United States and the Indian plaintiff might be characterized as a "trust" has never been recognized by the courts of appeals as a basis for a supposed exception in Indian cases, as respondent urges.[9] The principle respondent apparently has in mind is far narrower, and has no application here.

In *Capoeman,* the Court of Claims did observe that the statute of limitations would not bar a suit by an Indian that involved a liquidated claim, the validity of which was not contested by the government and for which money had been appropriated. 440 F.2d at 1003, citing *United States* v. *Taylor,* 104 U.S. 216 (1881); *Wayne* v. *United States,* 26 Ct. Cl. 274 (1891); and *Russell* v. *United States,* 37 Ct. Cl. 113 (1902). See also *Christensen* v. *United States,* 583 F. Supp. 1539, 1540-1541 (D. Nev. 1984), aff'd, 755 F.2d 705, 706-707 (9th Cir. 1985), petition for cert. pending, No. 85-372. But these cases do not rest on a finding of an actual "exception" to the statute of limitations. In such a case, the United States holds the funds in question for the beneficiary and is under a continuing duty to make them available for his benefit upon demand. As a result, the beneficiary is under no obligation to make such a demand within any particular period of time. See *United States* v. *Taylor,* 104 U.S. at 221-222.

However, the statute of limitations would begin to run in such a case if the beneficiary made a demand that the money

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[9]Contrary to respondent's contention, the Federal Circuit in *Menominee Tribe* v. *United States, supra,* did not recognize any such broad exception; it simply observed that an exception for situations involving an "express trust" had been urged in a prior case, *Fort Mojave Tribe* v. *United States, supra.* See 726 F.2d at 722. In its brief order in *Fort Mojave Tribe,* the court stated: "The facts do not show the existence of an express trust. The statute of limitations applies to Indians the same as to anyone else." 210 Ct. Cl. at 728. These two sentences scarcely constitute an endorsement of respondent's argument for a special exception for Indian plaintiffs generally.



be paid or used for his benefit and the responsible government official declined to do so. *United States* v. *Taylor,* 104 U.S. at 222; *Wayne* v. *United States,* 26 Ct. Cl. at 289; *Russell* v. *United States,* 37 Ct. Cl. at 118. That result would be but a particular application of the established rule that where property *is* held under an "express trust" (in *Taylor* and related cases, the statutory directive that the money be retained in the Treasury for the benefit of a particular person), the statute of limitations begins to run when the trustee repudiates the trust (see, *e.g., Taylor* v. *United States,* 104 U.S. at 222; *Philippi* v. *Philippe,* 115 U.S. 151, 156-157 (1885); *Speidel* v. *Henrici,* 120 U.S. 377, 386 (1887); *Benedict* v. *City of New York,* 250 U.S. 321, 327 (1919); Restatement (Second) of the Law of Trusts § 219 comment *b* (1959)) or commits a substantial breach demonstrating that he is no longer respecting the essential terms of the trust (see G. Bogert, *The Law of Trusts and Trustees* § 951 (rev. 2d ed. 1982)).[10]

In this case, even if we assume that the "bare trust" created by Section 5 of the General Allotment Act (*Mitchell II,* 463 U.S. at 224) should be regarded as an "express trust" for these purposes, that trust was unequivocally repudiated when the BIA sold the three parcels to the Forest Service in 1954. Because respondent had notice of that sale, the six-year limitations period under 28 U.S.C. 2401(a) began to

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[10]These principles were recognized in *Manchester Band of Pomo Indians, Inc.* v. *United States,* 363 F. Supp. 1238, 1249 (N.D. Cal. 1973), upon which respondent relies (Br. 18), and in *Lewis* v. *Hawkins,* 90 U.S. (23 Wall.) 119, 126 (1875), upon which amici rely (Nichols Amicus Br. 40-41; Navajo Amicus Br. 19). Until there is a repudiation or breach, the trust presumptively is being administered in accordance with its terms, and the beneficiary has no cause of action. G. Bogert, *supra,* § 951, at 547. But in this case, under respondent's view of BIA's statutory responsibilities, she did have a cause of action after 1954 because the trust was not being administered in accordance with its terms.

run in 1954, and this suit was barred long before it was filed in 1981.[11]

[11]Respondent (Br. 18) and amici (Nichols Amicus Br. 40-41; Navajo Amicus Br. 21 & n.32) cite several lower court decisions holding that the time limit in 26 U.S.C. 6511(a) for filing an administrative claim for a tax refund was inapplicable where taxes had erroneously been paid on income from tax-exempt property held in trust for Indians. See, *e.g.*, *Dodge* v. *United States*, 362 F.2d 810 (Ct. Cl. 1966); *Daney* v. *United States*, 247 F. Supp. 533, 535 (D. Kan. 1965), aff'd, 370 F.2d 791 (10th Cir. 1966); *Nash* v. *Wiseman*, 227 F. Supp. 552 (W.D. Okla. 1963). However, as the Court of Claims explained in *Capoeman*, those decisions have no application here. They all involved situations in which a BIA official had actually prepared the tax return for the Indian, and the Indian relied on the official to do so. See Rev. Rul. 68-172, 1968-1 C.B. 563; Rev. Rul. 61-11, 1961-1 C.B. 724. See also 34 Op. Att'y Gen. 302 (1924). An implied exception was recognized on equitable grounds because of that reliance, the resulting duty of the official to request a refund on the Indian's behalf, a likely absence of knowledge by the Indian, and a possible conflict of interest arising from the preparer's role as a personal agent for the Indian taxpayer (cf. *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985), slip op. 8-9) and as an official of the taxing government.

This case differs in a number of critical respects. First, it involves an express, jurisdictional condition on Congress's waiver of the United States' sovereign immunity to suit, not a time limit for filing an administrative request with an agency. Cf. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982). Second, no government official purported to act as a personal agent on behalf of respondent or induced reliance by her; the three parcels were sold by BIA officials acting solely in their governmental capacity. Third, the sale of the parcels constituted the termination or repudiation of any trust relationship between the United States and respondent with respect to her interests in that property; the preparation of the tax return in the cases cited above did not have that effect. Fourth, respondent had notice of BIA's action. And fifth, this case involves a dispute over title to real property, in which the interests of repose underlying statutes of limitations are the strongest. *Lewis* v. *Marshall*, 30 U.S. (5 Pet.) 470, 477-478 (1831); cf. *Arizona* v. *California*, 460 U.S. 605, 620 (1983).



C

Finally, respondent argues (Br. 10-13, 18-21) that the district court had jurisdiction over this suit under 25 U.S.C. 345, which governs "actions for allotments." Respondent then contends (Br. 23-28) that no statute of limitations applies to suits against the United States under 25 U.S.C. 345 and that this suit, commenced 27 years after the sale of the allotments, therefore is not time-barred. These arguments are without merit.

1. We have shown in our opening brief (U.S. Br. 34-37) that the text and legislative history of the Act of Aug. 15, 1894, ch. 290, § 1, 28 Stat. 305, in which Section 345 was enacted, demonstrate that Section 345 was intended to authorize only suits "for an original allotment" (F. Cohen, *Handbook of Federal Indian Law* 380 n.184 (1942)). As we have further demonstrated (U.S. Br. 37-40), Congress repeatedly adhered to that view on each of the four occasions on which it enacted statutes amending or specifically pertaining to Section 345 during the 17 years after 1894. Respondent does not even discuss the text, legislative history, and contemporaneous construction of Section 345 by Congress itself.[12]

[12]Amici Nichols, et al., argue (Br. 13-16) that our submission does not take account of the language in 25 U.S.C. 345 that provides for Indians to "prosecute *or defend* any action, suit, or proceeding in relation to their right" to an allotment (emphasis added by amici). Amici also cite the language in Section 345 that refers to claims "to an allotment * * * or * * * to have been unlawfully denied or excluded from any allotment." In their view, this language contemplates a suit between two Indians concerning an allotment already made. We agree that such a suit is within the scope of 25 U.S.C. 345. See *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U.S. 401, 407-409 (1904). But that conclusion is entirely consistent with our submission that Section 345 authorizes suits against the United States only to challenge actions of the Secretary that are taken in the process of the initial allotment of land on the reservation. See U.S. Br. 36.

In a case such as *Hy-Yu-Tse-Mil-Kin* v. *Smith*, *supra*, the plaintiff Indian contends that he is entitled to receive an allotment of the parcel

In urging a broader interpretation of Section 345, respondent instead relies (Br. 10-13) on certain court of appeals decisions. However, as we explain in our opening brief (U.S. Br. 42-43 n.22), the earliest of those decisions was rendered more than 50 years after Section 345 was enacted in 1894 (see *Gerard* v. *United States,* 167 F.2d 951 (9th Cir. 1948)), and none of those decisions considered the legislative history of Section 345 and the subsequent statutes passed by Congress that confirm the correctness of our interpretation of Section 345. Moreover, the decisions upon which respondent relies were inconsistent with this Court's holding in *First Moon* v. *White Tail,* 270 U.S. 243 (1926), that the jurisdictional counterpart of 25 U.S.C. 345, now contained in 28 U.S.C. 1353, "has reference to *original*

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that the Secretary instead has allotted to another Indian. Once that dispute is settled, the allotment of the parcel is final, and there is no occasion for further resort to a suit under 25 U.S.C. 345. As we have explained (U.S. Br. 37-38, 39-40), that view of Section 345 underlay Congress's enactment of provisions in 1906 and 1911 to make Section 345 inapplicable to the Osage Indians and the Five Civilized Tribes, because special commissions had been established for the non-judicial resolution of disputes that might arise in the initial allotment of land to those Indians. See Act of June 28, 1906, ch. 3572, § 1, 34 Stat. 540 (repealing as to the Osage Indians the provisions of the 1894 Act that "grant[] persons of Indian blood who have been *denied allotments* the right to appeal to the courts" (emphasis added)).

This interpretation also gives meaning to the entire clause in 25 U.S.C. 345 upon which amicus Navajo Tribe relies (Br. 7-8). That clause refers to "persons * * * who claim to have been unlawfully * * * excluded from any allotment *or* any parcel of land to which they claim to be entitled" (emphasis added). The first portion of this clause would cover a situation in which a claimant has been altogether excluded from the allotment process, perhaps because he was determined not to be eligible for an allotment (see *Halbert* v. *United States,* 283 U.S. 753 (1931)); the latter portion would cover a situation in which the Secretary had determined that particular land was not suitable for allotment (see *United States* v. *Payne,* 264 U.S. 446 (1924)) or that another Indian had a superior claim to the parcel (see *Hy-Yu-Tse-Mil-Kin* v. *Smith, supra*).



*allotments* claimed under some law or treaty, and not to disputes concerning the heirs of one who held a valid and unquestioned allotment" (270 U.S. at 245 (emphasis added)).[13] Indeed, the Ninth and Tenth Circuits, upon

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[13]Amici Nichols, et al., contend (Br. 28) that prior to the Act of June 25, 1910, ch. 431, 36 Stat. 855 *et seq.*, which provided for the Secretary to determine the heirs of an allottee and foreclosed judicial review (see § 1, 25 U.S.C. 372), some lower courts resolved disputes among the heirs of an original allottee in suits brought under the Act of August 15, 1894, now codified at 25 U.S.C. 345. However, the only decision respondent cites for that proposition is *Patawa* v. *United States,* 132 F. 893 (C.C.D. Or. 1904), which ruled on a demurrer on other matters and did not consider this jurisdictional question. By contrast, in two other cases in which the court did consider whether the 1894 Act afforded a basis for jurisdiction, both courts expressed doubt whether the 1894 Act was intended to apply to heirship disputes (as distinguished from disputes concerning the initial execution of the allotment Act itself); but both courts found it unnecessary to resolve that question because the Act of June 25, 1910 had in any event foreclosed whatever jurisdiction might once have existed. See *Bond* v. *United States,* 181 F. 613, 616 (C.C.D. Or. 1910); *Pel-Ata-Yakot* v. *United States,* 188 F. 387, 388 (C.C. D. Idaho 1911). This Court, too, declined to consider whether the 1894 Act conferred jurisdiction to resolve disputes among the heirs of the original allottee, in light of the intervening Act of June 25, 1910. See *Hallowell* v. *Commons,* 239 U.S. 506, 508 (1916). Against this background of Congress's prompt *foreclosure* of judicial consideration of heirship questions, respondent can derive no significant support from the single heirship case she cites (*Patawa*) or the apparent handful of other cases of a similar nature in which the jurisdictional issue was not even addressed (*Bond,* 181 F. at 616).

Amici also rely (Nichols Br. 9-10, 17, 21, 25; Navajo Br. 10, 12) on *McKay* v. *Kalyton,* 204 U.S. 458 (1907). But the holding in *McKay* was simply that the *state* courts did not have jurisdiction to resolve a dispute between Indians who alleged that they were heirs of an original allottee. The Court referred to the 1894 Act in dicta, as part of a general discussion of the proposition that Congress consistently has vested responsibility for resolving matters concerning allotments in the Secretary or the federal courts. 204 U.S. at 467-469. The Court had no occasion to, and did not purport to, give a definitive construction to the 1894 Act or define its scope. Moreover, as amici Nichols, et al., concede (Br. 10-11 n.3), jurisdiction over the particular type of dispute involved in *Kalyton* itself was soon foreclosed by Congress in the Act of June 25, 1910.

whose decisions respondent principally relies, in fact had previously adopted the interpretation of Section 345 we urge in this case. See *United States* v. *Eastman*, 118 F.2d 421, 423 (9th Cir.), cert. denied, 314 U.S. 635 (1941); *Harkins* v. *United States*, 375 F.2d 239, 241 (10th Cir. 1967)(cited with approval in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 142 (1972)); *Vicenti* v. *United States*, 470 F.2d 845, 848 (10th Cir. 1972), cert. dismissed, 414 U.S. 1057 (1973).[14]

However, there is no reason in this case for the Court to resolve the question of the precise scope of Congress's consent to suit under 25 U.S.C. 345 as originally enacted. This is so because, as explained above (see pages 8-9, *supra*), the QTA is now the exclusive means by which a claimant, including an Indian, may bring an action to resolve a disputed question of title to land in which the United States claims an interest.

2. Even if, contrary to our submission above, respondent once did have a viable cause of action under 25 U.S.C. 345 to challenge the United States' title, this suit now is barred by the statute of limitations in 28 U.S.C. 2401(a). As we explain in our opening brief (U.S. Br. 47-49), Section 2401(a) provides that "*every* civil action" against the United States shall be barred unless it is commenced within six years of the date on which the cause of action first accrued. This includes not only suits under the Tucker Act, but suits under 25 U.S.C. 345 and 28 U.S.C. 1353 as well.

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[14]Contrary to the argument of amicus Navajo Tribe (Br. 12), the Tenth Circuit in *Vicenti* did not affirm the judgment of the district court vesting title to the allotments in the Indians. The parties affected by that aspect of the district court's judgment did not appeal, and the court of appeals therefore had no occasion to consider that question. Only the Indian plaintiffs appealed, challenging the district court's refusal to award money damages against the United States. 470 F.2d at 847. In rejecting that claim, the court of appeals adhered to the "restrictive interpretation" (*id.* at 849) that it had given Section 345 in *Harkins*. Thus, it was not until *Begay* v. *Albers*, 721 F.2d 1274 (1983), that the Tenth Circuit adopted a broader view of Section 345.



Respondent relies (Br. 24-25) on the fact that prior to the 1948 revision of Title 28, a six-year statute of limitations was contained in 28 U.S.C. (1946 ed.) 41(20), the grant of Tucker Act jurisdiction to the district courts, but not in 28 U.S.C. (1946 ed.) 41(24), the predecessor to the present 28 U.S.C. 1353. However, in the 1948 revision, Congress lifted the limitations provision from the paragraph granting Tucker Act jurisdiction, where it was applicable only to actions "under this paragraph"; Congress instead placed the limitations provision in a separate Chapter 161 of Title 28, entitled "United States as a Party *Generally*" (emphasis added), and it unambiguously provided that it would apply to "every civil action" against the United States. In light of this change, it is not surprising that every court of appeals that has considered the question has concluded that the statute of limitations in 28 U.S.C. 2401(a) is not confined to Tucker Act suits. See U.S. Br. 48. In addition, the Ninth Circuit has specifically held that 28 US.C. 2401(a) applies to suits against the United States under 25 U.S.C. 345 (see U.S. Br. 32, 48), and the Eighth Circuit did not disagree in this case.[15] That settled construction of 28 U.S.C. 2401(a) should be followed here. Respondent's suit therefore is time-barred even if it does arise under 25 U.S.C. 345 and 28 U.S.C. 1353.

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[15]This case therefore is not at all like *McDonald* v. *Hovey*, 110 U.S. 619 (1884), upon which respondent relies (Br. 25-26). See also Nichols Amicus Br. 50-51. In *McDonald*, the Court observed that the phraseology of the original and revised statutes of limitation was "so nearly identical * * * in reference to the point under consideration, that we must presume they were intended to have the same construction" (110 U.S. at 623). The Court further observed that "upon a revision of statutes, a different interpretation is not to be given to them without some substantial change in phraseology—some change other than what may have been necessary to abbreviate the form of the law" (*id.* at 629). In this case, as explained in the text, there manifestly was a "substantial change in phraseology" of the statute of limitations in 1948.

## CONCLUSION

For the foregoing reasons and the additional reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

APRIL 1986

(4)

No. 85-546

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

---

UNITED STATES OF AMERICA,
*Petitioner,*

v.

FLORENCE BLACKETTER MOTTAZ,
on behalf of herself and all others
similarly situated,
*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

---

## MOTION AND BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES

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JOHN C. CHRISTIE, JR.
Counsel of Record
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300

Dated: January 9, 1986

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## MOTION OF THE AMERICAN LAND TITLE ASSOCIATION REQUESTING LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES

---

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the American Land Title Association (the ALTA) respectfully moves the Court for leave to file the accompanying "Brief of the American Land Title Association as *Amicus Curiae* in Sup-

port of the United States." The grounds for this motion are stated below and in the section of the accompanying brief headed "Interest of *Amicus Curiae*."

The ALTA requested each party's written consent to the filing of its *amicus curiae* brief as required under Rule 36. Petitioner United States consented to the filing of the brief by letter from the Solicitor General, reproduced as Exhibit A to this motion. Respondent Mottaz withheld her consent by letter from counsel, reproduced as Exhibit B.

The ALTA is the national trade association of the land title industry. Members of the ALTA depend on long-established legal doctrines concerning real estate and claims to real estate in ascertaining and insuring the rights of real estate purchasers, mortgage lenders and others, and in litigating matters pursuant to obligations under title insurance policies. As more fully set forth in the accompanying brief, the ALTA has an interest in the pending case because the decision by the United States Court of Appeals for the Eighth Circuit is fundamentally wrong and a decision by this Court affirming the decision below would destroy critical principles affecting the title to real property which have been developed over the years throughout the United States.

The ALTA believes that it is uniquely positioned to inform the Court regarding the adverse consequences of the Eighth Circuit's error for private persons who have relied on the established principles by which stability of real estate titles has traditionally been secured. As more fully set forth in the accompanying brief, the petitioner is unlikely to address the same issues that concern the ALTA.



For the reasons set forth above and in the accompanying brief, the motion for leave to file the attached brief as *amicus curiae* should be granted.

Respectfully submitted,

JOHN C. CHRISTIE, JR.
Counsel of Record
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
*Attorneys for the American Land Title Association*

Dated: January 9, 1986

EXHIBIT A

U.S. DEPARTMENT OF JUSTICE
Office of the Solicitor General
Washington, D.C. 20530

December 12, 1985

Lucinda O. McConathy, Esq.
Bell, Boyd & Lloyd
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4678

Re: *United States* v. *Mottaz*, No. 85-546

Dear Ms. McConathy:

As requested in your letter of December 9, 1985, I hereby consent to the filing of a brief *amicus curiae* on behalf of the American Land Title Association.

Sincerely,

/s/ Charles Fried
CHARLES FRIED
Solicitor General



EXHIBIT B

DERCK AMERMAN
Attorney at Law
2408 Central Avenue, N.E.
Minneapolis, Minnesota 55418-3792
789-8805

December 11, 1985

Ms. Lucinda O. McConathy
Bell, Boyd & Lloyd
1775 Pennsylvania Avenue N.W.
Washington, DC 20006

RE: U.S. v. Mottaz, et al.

Dear Ms. McConathy:

This is in response to your letter of December 9, 1985 wherein you requested written consent to your filing an *amicus curiae* brief.

Please be advised that the answer is "No".

Yours very truly,

/s/ [Illegible]
DERCK AMERMAN

DA:dn

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IN THE

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**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES

---

### INTEREST OF THE *AMICUS CURIAE*

The American Land Title Association is the national trade association of the land title industry. The ALTA has approximately 2,000 members, including land title insurers, title insurance agents, abstractors and associate members. The ALTA and its members work to facilitate the safe, certain and efficient transfer of title

to residential and commercial real estate throughout the country. In the course of ascertaining and insuring the rights of real estate purchasers, mortgage lenders and others, and in the course of litigation pursuant to obligations under title insurance policies, members of the ALTA depend upon long-established legal doctrines concerning real estate and claims to real estate. Certainty and predictability of the laws affecting rights in real estate are crucial to the ALTA and its members.

The ALTA has an interest in the pending case because the decision by the United States Court of Appeals for the Eighth Circuit is fundamentally wrong. If left uncorrected, that decision would create confusion and uncertainty and would impose tremendous unanticipated risks on all persons with an interest in land—homeowners, businesses, farmers, lenders and ALTA members alike.

First, the Eighth Circuit erred in declaring that in a dispute over land no cause of action accrues within the meaning of a statute of limitation where the claimant argues that he retains title to the land.[1] Under the logic—or illogic—of the Eighth Circuit's decision, any claim asserting title to land could be litigated, no matter when the events occurred which gave rise to the claim. Only after litigation on the merits and a determination whether the claimant retained title to the land at issue, could a court decide whether a claim had accrued within the meaning of a statute of limitation. People who own land, buy land, and assist in the process of buying and selling land depend upon statutes of limitations, marketable title acts and other time bars in determining who holds title and as protection from stale claims. Statutes of limitations and other time bars contribute to the predictability and stability of land ownership, and any misunderstanding as to their application would have grave

[1] Mottaz v. United States, 753 F.2d 71, 74 (8th Cir. 1985), *cert. granted*, —— U.S. ——, 106 S.Ct. 405 (1985).



consequences for the ALTA and its members, as well as other persons with interests in land.

Second, the Eighth Circuit erred in declaring that a claim for land based on a conveyance by Indians in violation of a federal restriction on alienation can never be barred because the original transfer was void.[2] If that were true, conceivably every title examination would require tracing the chain of title all the way back to its beginning and historical research to determine whether any transfer involved an Indian and, if so, whether any restrictions had existed and whether they had been satisfied. The customary reliance of land purchasers, lenders, and title insurers on matters of public record would very likely have to be reevaluated.

Third, the Eighth Circuit erred in declaring that neither state nor federal statutes of limitations apply to Indian land claims because of the federal government's generally protective policies toward Indians.[3] In essence, the court of appeals held that any Indian claim relating to land may be brought at any time in the future.[4] Under that view, no land title is secure.

[2] *Id.*

[3] *Id.*

[4] There are a number of other pending and potential Indian land claims where ancient land transfers are alleged to have been invalid, so the Eighth Circuit's error has significance far beyond the case at hand. *See* Catawba Indian Tribe v. South Carolina, 718 F.2d 1291 (4th Cir. 1983), *reh'g en banc*, 740 F.2d 305 (1984), *cert. granted*, —— U.S. ——, 105 S.Ct. 2762 (1985); Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297 (N.D.N.Y. 1983); Canadian St. Regis Band of Mohawk Indians v. New York, 97 F.R.D. 453 (N.D.N.Y. 1983). *See also* Statute of Limitations Claims List, 48 Fed. Reg. 51204-51253 (Nov. 7, 1983); 48 Fed. Reg. 13698-13920 (Mar 31, 1983) (Department of the Interior listing of potential Indian land claims in the "Eastern Area"). *Cf.* Alabama Coushatta Tribe v. United States, Cong. Ref. No. 3-83 (Ct. Cl. 1983) (claiming tribe possesses unextinguished aboriginal title to 17 counties in Texas).

The ALTA has filed this *amicus* brief because the above-mentioned issues are so important and because the briefs of the parties, both in the Eighth Circuit and in this Court (respecting the Petition for Certiorari), focus mainly on other issues such as the federal government's sovereign immunity, the nature of the claim, and which of two federal statutes of limitations, if any, might apply to the claim.[5] The interests of the ALTA and other private parties throughout the nation in a stable, secure and rational land title system would not be adequately protected otherwise.

As this Court long-ago explained:

> The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate.

[5] It should be recognized that the United States is in a peculiar position, fraught with overtones of a conflict of interest, when it is sued by Indians or Indian tribes. As defendant in such a case, the government seeks to protect the public treasury. In other cases, the government is the Indians' "guardian" and may sue private parties and states to protect Indian rights. *E.g.*, Montana v. United States, 450 U.S. 544 (1981); United States v. Winans, 198 U.S. 371 (1905). *Cf.* Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co., 353 F. Supp. 1098 (1972) (Indian trespass damage claim against federal licensees created conflict of interest and United States Attorney General refused to represent Indians). Because of its dual role, when the United States is a defendant in Indian land claims it has an incentive to pursue most vigorously the narrow defenses available to the United States but not to others. In so doing it may preserve the Indians' ability to seek redress from others.

As *amicus*, the ALTA does not address which of the federal statutes of limitations under discussion may apply to the particular claim presented. The ALTA's concern, and the focus of this brief, is on the Eighth Circuit's misconception of the general operation of all statutes of limitations and on its misunderstanding of the law relating to Indian land claims.



> Labor is paralysed where the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to individuals.[6]

The ALTA's purpose in filing this *amicus* brief is to prevent such dire results.

## SUMMARY OF ARGUMENT

The Eighth Circuit totally misconceived the meaning of the term "accrued" and the operation of statutes of limitations. A cause of action to recover land or the value of land has accrued once the claimant is able to assert the action in court. A statute of limitation measures time from the moment that a cause of action accrues, and, once the time limit specified in a statute of limitation is passed, the statute bars the action from being litigated in court. It makes no difference whether the claimant is right or wrong on the merits.

In addition, relying on a misinterpretation of this Court's decision in *Ewert* v. *Bluejacket*,[7] the Eighth Circuit erred in holding that no statute of limitation can bar a claim that a transfer of Indian lands violated a federal restriction on alienation. In *Ewert* the Court prevented a federal employee involved in Indian affairs from retaining land that he had purchased from an Indian in spite of a federal law prohibiting such persons from trading with Indians. The issue was whether the wrongdoer could be allowed to assert the equitable defense of laches, not whether a claim based on an allegedly void transfer of Indian land could be barred by a statute of limitation. In fact, in *Joines* v. *Patterson*[8]

[6] Lewis v. Marshall, 30 U.S. (5 Pet.) 470, 477-8 (1831). *See also Developments In Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950) ("There comes a time when one ought to be secure in his reasonable expectations that the slate has been wiped clean of ancient obligations.").

[7] Ewert v. Bluejacket, 259 U.S. 129 (1922).

[8] Joines v. Patterson, 274 U.S. 544 (1927).

this Court rejected the argument adopted by the Eighth Circuit, holding that a statute of limitation barred a claim to recover Indian land even if it was conveyed in violation of the law. A number of decisions by this Court and various lower courts demonstrate that although Indians may attempt to avoid transfers of their lands that occurred in violation of federal restrictions on alienation in certain circumstances, their claims may be barred in other circumstances. Furthermore, neither precedent nor federal policy support the Eighth Circuit's conclusion that a federal statute of limitation may not apply to such claims.

## ARGUMENT

### I. Introduction.

Mrs. Mottaz inherited an interest in three Indian allotments in the early 1950s. The United States, through the Secretary of the Interior, instituted a program of selling such Indian allotments in 1953. Although the Department of the Interior sent the Indians letters requesting the written consent of the Indians, the Department assumed their consent if they did not respond to the request. In 1953 the Department sent such a letter to Mrs. Mottaz. In 1954 the United States sold Mrs. Mottaz's land to itself,[9] and those allotments are now in the Chippewa National Forest. Mrs. Mottaz may have received payment in 1955, since the federal government customarily made arrangements to pay for such allotments shortly after purchase. In any event, she was informed by 1967 that she held no interest in those three tracts of land when the Bureau of Indian Affairs provided her a list of her interests in federally-protected lands which excluded the three allotments in issue. Only on December 30, 1981, did she file a complaint alleging that the sale of those allotments was void.

[9] The sale of these and other allotments are sometimes referred to as "secretarial transfers" since the Secretary of the Interior arranged such sales to the federal government.



The United States District Court for the District of Minnesota granted summary judgment for the defendant, the United States, on the ground that the action was barred by a six-year federal statute of limitation for civil actions against the United States, 28 U.S.C. § 2401 (a) (1982). Before the United States Court of Appeals for the Eighth Circuit the United States argued that the claim also was barred under a twelve-year federal statute of limitation for quiet title actions, 28 U.S.C. § 2409a(f) (1982). The Eighth Circuit sought to preserve Mrs. Mottaz's ability to recover, holding that no federal statute of limitation may bar a claim by an Indian to hold title to land that was "wrongfully alienated" at some time in the past.[10] The Eighth Circuit may have been uncomfortable with the conduct of the United States, as alleged by the plaintiffs,[11] but it misstated the law. Its decision unnecessarily endangers the land titles of thousands of innocent people and should be reversed.

### II. A Claim Has Accrued Within The Meaning Of A Statute of Limitation Whenever A Suit May Be Commenced.

The concept of accrual is basic to litigation and to the application of all time bars, including statutes of limitations. Black's Law Dictionary states, "A cause of action 'accrues' when a suit may be maintained thereon." [12] The moment an action accrues marks the begin-

[10] *Mottaz*, 753 F.2d at 74.

[11] No determination has been made whether the sale of Mrs. Mottaz's allotments, in fact, violated any federal restrictions on alienation. Such secretarial transfers may have been perfectly legal. But the Eighth Circuit's emphasis on a "fair" result suggests that it viewed the United States' conduct as unfair to Mrs. Mottaz. *See Mottaz*, 753 F.2d at 75.

[12] Black's Law Dictionary, definition of "accrue," at 37 (4th ed. 1968). *See also, e.g.*, Impro Products, Inc. v. Block, 722 F.2d 845, (D.C. Cir. 1983), *cert. denied*, —— U.S. ——, 105 S.Ct. 327 (1984) (a cause of action accrues when right to resort to court is perfected); Lamb v. Amalgamated Labor Life Ins. Co., 602 F.2d

ning of a time period during which the action may be brought before a court, and a statute of limitation specifies a deadline for bringing the cause of action.[13] As this Court explained in *Rawlings* v. *Ray*: [14]

> The words [in the applicable statute of limitation] "after the cause of action shall accrue" . . . have their usual meaning and refer to "a complete and present cause of action."

Similarly, in *Cope* v. *Anderson*,[15] the Court said:

> [T]he question of when the applicable state statute of limitations begins to run depends upon when . . . [the plaintiff] is empowered . . . to bring suit.

A claimant usually may sue (and the claimant's cause of action usually accrues) once the transaction or event which is the basis of the claim has occurred.[16] Even

155, 158 (8th Cir. 1979) (under Missouri law, a claim for relief accrues when a right exists to institute a suit for its enjoyment).

[13] Black's Law Dictionary, definition of the term "limitation," (4th ed. 1968) at 1077 ("[A statute of limitation is a] restriction by statute of the right of action to certain periods of time, after the accruing of the cause of action."). *See also Lamb*, 602 F.2d 155 (under Missouri law, statute of limitation begins to run when a claim for relief accrues).

[14] Rawlings v. Ray, 312 U.S. 96, 98 (1941).

[15] Cope v. Anderson, 331 U.S. 461, 464 (1947).

[16] This Court, for example, explained in Grayson v. Harris, 279 U.S. 300 (1929), that a statute of limitation for suits to recover land begins to run on a title holder's action when another person either asserts a right to the land or takes possession of it in conflict with the title holder's interest. The Court considered that a cause of action accrues whenever someone asserts rights in the land adverse to or in conflict with the title holder's interest. As a result, the Court held that a statute of limitation had not run on a claim where the conflicting assertion of right to the land occurred within the limitation period.

As the Court said in *Cope*, 331 U.S. at 466: "[A] cause of action is the fact or combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf."



where a claimant seeking to recover title to land alleges that a previous transfer of title was ineffective and void, the date the cause of action accrued does not depend upon resolution of the allegation that the transfer was void. The cause of action in such a case—the demand for redress—accrued at the time of the transfer since that is the event giving rise to a conflicting assertion of rights.

For example, in *Joines* v. *Patterson* [17] this Court rejected the argument that a statute of limitation had not run against a claim to recover former Indian allotment lands because the underlying transfer was invalid. In that case, when the Indian allottee died her interest in the lands passed to her husband, a non-Indian, and to her five minor children. The husband, purporting to act as guardian for the children, sold those lands, but, some number of years later, he and they sued the purchaser to recover them. They argued that the applicable statute of limitation had not begun to run "since no interest passed to [the purchaser]." [18] The Court specifically stated that the court below had erred in accepting that view,[19] and later said in discussing the applicable statute of limitation:

> It is of the nature of the statute of limitation, when applied to civil actions, in effect, to mature a wrong into a right, by cutting off the remedy.[20]

Thus, if the claimant has not filed the action within the time specified by the applicable statute of limitation, the

[17] Joines v. Patterson, 274 U.S. 544 (1927).

[18] *Id.* at 548.

[19] *Id.*.

[20] *Joines*, 274 U.S. at 553 (*quoting* Ferguson v. Peden, 33 Ark. 150, 155 (1878); Jacks v. Chaffin [illegible]379), 34 Ark. 534, 541; Logan v. Jelks, 34 Ark. 547, 549 (1879)).

In a variety of contexts the Court has repeatedly declared that statutes of limitations do not depend upon whether the plaintiff has

claim is barred, whether or not a claimant could establish title and recover the land if the litigation were allowed to proceed.[21]

Consistent with this Court's directives, in *Wolfe* v. *Phillips*[22] the Tenth Circuit declared with respect to a claim to recover formerly-restricted Indian land:

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valid rights. Rather statutes of limitations operate regardless of whether the plaintiff has valid rights. *E.g.*, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-4 (1975) ("Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting the suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones"); Kavanaugh v. Noble, 332 U.S. 535, 539 (1947) ("[P]eriods [of limitation] are established to cut off rights, justifiable or not . . . * * * Remedies for resulting inequities are to be provided by Congress, not the courts.").

[21] Statutes of limitations may be tolled in various situations, in which case the time will not run against the claimant, extending the deadline for bringing an action. The tolling of a statute of limitation, however, does not change the date on which an action accrues and could be brought by the claimant. *See, e.g.*, Johnson v. United States, 87 F 2d 940 (8th Cir. 1937) (where statute of limitations was tolled for persons disabled from bringing suit, those disabled persons could still bring an action during the period of the disability through their guardians).

In certain circumstances, where Indian land is subject to a federal restriction on alienation that has never been removed, *state* statutes of limitations may be tolled for a related claim. *See* discussion below at 16-18. But that does not alter the date such a claim accrued or the Indian's ability to bring the claim. *Cf.* New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1211 (1977) (where court stated that federal trusteeship did not deprive Indians of right to sue on their own behalf). Nor does that prevent other defenses from applying in appropriate circumstances, such as federal statutes of limitations or the doctrine of laches or the *bona fide* purchaser doctrine. And once such a restriction on alienation is removed, state statutes of limitations begin to run. *See* discussion below at 16-18.

[22] Wolfe v. Phillips, 172 F.2d 481, 486 (10th Cir. 1949), *cert. denied*, 336 U.S. 968 (1949).



> The [applicable five-year period of limitations] began to run . . . and the instant action became barred . . . irrespective of whether such [allegedly void] deed was valid or void. Therefore, we find it unnecessary to determine the conflicting contentions of the parties with respect to the validity of such deed.

In this case the transaction which gives rise to the complaint occurred in 1953-1955, when the Secretary of the Interior allegedly transferred the land to the federal government improperly, after notifying the plaintiff of its intent to sell the land and documenting the transfer.[23]

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[23] If a suit to recover land is based on allegations of fraud, a right of action accrues—and the applicable statute of limitation begins to run—when the plaintiff becomes aware of the fraud or reasonably should have become aware of the fraud. *E.g.*, Exploration Co. v. United States, 247 U.S. 435 (1918); Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922); Ewbank v. Lyman, 170 N.C. 505, 87 S.E. 348 (1915). Similarly, *see* Newman v. Prior, 518 F.2d 97, 100 (4th Cir. 1975) (In an action for fraud in connection with securities law violations, court said: "The statute [of limitation] does not begin to run until the fraud is either actually known or should have been discovered by the exercise of due diligence."). *See also* Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230, 234 (6th Cir. 1974); Laundry Equipment Sales v. Borg-Warner Corp., 334 F.2d 788, 792 (7th Cir. 1964).

In this case, if the pending claim were viewed as a claim against the United States for conduct akin to fraud, then the question of when the plaintiff should have been aware of the secretarial transfer might become relevant. Also, one of the federal statutes of limitations asserted to bar the action, the twelve-year limitation for actions to quiet title, provides that an action subject to that limitation "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States" to have an interest in the land adverse to the plaintiff's. 28 U.S.C. § 2409a(f) (1982). The United States contends that the plaintiff was aware of an adverse interest in the land by 1955, since her complaint does not deny that she received the letter notifying her the land would be sold and payment for its sale. In any event, the United States contends that she became aware of the adverse interest asserted by the government in 1967, when she received a listing of her property that failed to include the land in dispute. In either case, the claim accrued more than twelve years before the plaintiff brought suit in 1981.

Nevertheless, the Eighth Circuit declared that no action had accrued, apparently confusing the accrual of a cause of action seeking to enforce alleged rights with the underlying rights:

> [I]f the underlying sale of land is void, the concept that a cause of action "accrues" at some point is inapplicable because the allottee simply retains title all along.[24]

The court of appeals' concept of accrual puts the proverbial cart before the horse by requiring litigation on the merits of a claim regardless of when the claim is brought, and by making the application of a time bar such as a statute of limitation depend not upon the passage of time but upon resolution of the question whether the transfer at issue violated the law.[25]

Whether or not the plaintiff in this case might be successful in establishing a right to the lands at issue on the theory that the secretarial transfers were improper, a claim has accrued. And if a statute of limitation is applicable, it started to run when the cause of action accrued. The Eighth Circuit distorted the legal principles relating to causes of action and statutes of limitations to achieve its result.

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[24] *Mottaz*, 753 F.2d at 74.

[25] Indeed, if no claim has accrued, as the Eighth Circuit states, then no claim is properly before the Court. This only reveals the absurdity of saying that no claim has accrued. A claim must accrue to permit the plaintiff to enforce his rights in court. Where a person asserts ownership of land which someone else also purports to own, a conflict exists. Each has accrued a claim which may be asserted in court, even though only one will be successful on the merits.

*See* Stubbs v. United States, 620 F.2d 775, 780-81 (10th Cir. 1980), where (in a non-Indian context) the court of appeals rejected the argument that a federal statute of limitation did not run against the plaintiff's claim for land which the United States had purchased and placed in a national forest because the original transfer had been illegal and a "nullity." The court decided that regardless of the validity of the transaction on which the claim was based, the United States had asserted an interest in the land adverse to the plaintiff's and the claim had accrued, starting the running of the statute of limitation. The claim was barred.



If not corrected, the decision could undermine the security of land titles across the country, to the damage of all persons with any interest in land.[26] As this Court has stated repeatedly for over a century, statutes of limitations are both necessary and beneficial to a society:

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States* v. *Marion*, 404 U.S. 307, 322, n.14 (1971); *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1965); *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945); *Missouri, K & T.R. Co.* v. *Harriman*, 227 U.S. 657, 672 (1913); *Bell* v. *Morrison*, 1 Pet. 351, 360 (1828).[27]

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[26] This Court has long recognized the importance of stability in land titles. *See, e.g.*, Summa Corp. v. California, —— U.S. ——, 104 S.Ct. 1751, 1757-8 (1984); Arizona v. California, 460 U.S. 605, 620 (1983); United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924).

[27] United States v. Kubrick, 444 U.S. 111, 117 (1979).

### III. A Claim To Set Aside A Transfer Of Indian Land Can Be Barred Regardless Of Whether The Transfer Was Void.

The court of appeals refused to apply any federal statute of limitation to the claim, primarily relying upon this Court's decision in *Ewert* v. *Bluejacket*,[28] which the court of appeals described as holding that time bars such as state statutes of limitations and the doctrine of laches cannot apply to a claim that Indian land was sold in violation of federal restrictions on alienation because in such cases the Indian retains title to the land.[29] The court below misinterpreted *Ewert* v. *Bluejacket*, which in fact applied the doctrine of laches and contemplated that a claim to recover former Indian land could be barred in certain circumstances.[30]

The *Ewert* v. *Bluejacket* case was one of several disputes over former Indian allotments that involved Paul A. Ewert, a lawyer who was employed between 1908 and 1912 by the federal government to conduct litigation concerning Indian lands.[31] During his tenure with the federal government Ewert bought a number of Indian allotments at bargain prices, sometimes directly from the allottee and sometimes indirectly through an agent. In *Ewert* v. *Bluejacket* the heir to certain allotted lands requested that the deed to Ewert be declared invalid be-

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[28] Ewert v. Bluejacket, 259 U.S. 129 (1922).

[29] *Mottaz*, 753 F.2d at 74.

[30] In County of Oneida v. Oneida Indian Nation (*Oneida II*), —— U.S. ——, 105 S.Ct. 1245, 1267 (1985) (Justice Stevens dissenting, joined by the Chief Justice, Justice White and Justice Rehnquist) (emphasis in original), four Justices concluded:

> A close examination of the *Ewert* [v. *Bluejacket*] case . . . indicates that the Court *applied* the doctrine of laches . . . .

[31] *See* Ewert v. Bluejacket, 259 U.S. 129 (1922); Kendall v. Ewert, 259 U.S. 139 (1922); Hampton v. Ewert, 22 F.2d 81 (8th Cir. 1927), *cert. denied*, 276 U.S. 623 (1928).



cause Ewert had purchased the land in violation of a federal statute that prohibited any person "employed in Indian affairs" from having an interest in any trade with Indians.[32] Ewert asserted the equitable defense of laches even though he had been responsible for the illegal act alleged as the basis for invalidating the land transfer. The Court denied him, as the wrongdoer, the benefit of laches, applying the traditional equitable principle that only one acting in good faith should be able to take advantage of laches. The decision rendered the transfer of Indian land void as to a purchaser who (apparently knowingly) violated the law.[33]

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[32] In Ewert v. Bluejacket the land in controversy was sold at public auction in the manner prescribed by the Secretary of the Interior. The Court assumed compliance with other restrictions on the alienation of the Indians' land. Ewert v. Bluejacket, 259 U.S. at 134-5. *See also* Kendall v. Ewert, 259 U.S. at 141-2 ("In the *Bluejacket Case* we have held that, assuming the sale to have been made in the public manner required by the rules of the department, all required action to have been, in form, properly taken, and the deed therein to have been approved by the Secretary of the Interior, nevertheless it was void because Ewert was prohibited . . . from then becoming the purchaser of such Indian lands. . . .").

[33] Some of Ewert's illegal purchases of Indian lands were particularly egregious because they violated rules established in judicial decisions where he had represented the United States. *See* Hampton v. Ewert, 22 F.2d at 89, noting Ewert's involvement in United States v. Noble, 237 U.S. 74 (1915). Ewert attempted to save at least one of his illegal purchases by procuring settlement of a law suit through fraud. *See* Kendall v. Ewert, 259 U.S. at 142. It is difficult to imagine a defendant less entitled to the benefits of an equitable defense.

Indeed, in *Oneida II*, 105 S.Ct. at 1267 (dissenting opinion) (emphasis supplied), Justice Stevens wrote:

> On the facts of *Ewert*, the Court found that the plaintiffs' burden of disproving laches was easily met, but the Court might well have reached a different conclusion in *Ewert* if the conveyance had not been so recent, *if the defendant had not been as blameworthy*, or the character of the property had changed dramatically in the interim.

By no means did the Court suggest that a claim to recover former Indian lands can be asserted at any time against any person. Nor did the Court suggest that persons not involved in the allegedly illegal transfer of Indian land could not later gain an interest in that land even if the original transfer from the Indians was in some manner illegal. To the contrary, the Court assumed that after recovering the land from Ewert the plaintiff Indian would have to pay the mortgage that Ewert had placed on the property to prevent foreclosure. The Court therefore stated that Ewert should indemnify the plaintiff.[34] In effect the Court held that the mortgage was a valid and enforceable lien, and it anticipated the possibility that the land could have passed from the Indian allottee through Ewert to the mortgagee in a foreclosure.

This Court in fact has made it clear that a transfer of Indian land in violation of federal law may not be set aside when the land at issue has been transferred to an innocent purchaser or substantial time has elapsed since the allegedly illegal transaction or the character of the land has changed. This is so even if the original transfer was void and the land might have been recoverable in the hands of a wrongdoer. For example, in *Schrimpscher* v. *Stockton*[35] the Court held that a conveyance of an Indian allotment in violation of a restriction on alienation contained in a federal treaty could not be challenged or set aside by the Indian heirs of the Wyandotte Indian who had conveyed the land. Among other things, the heirs argued that they retained title because the original transfer was void and that, as a result, no statute of limitation could run against the claim.[36] The Court rejected the argument, although it acknowledged that the original

[34] Ewert v. Bluejacket, 259 U.S. at 138. *See also* Kendall v. Ewert, 259 U.S. at 150.

[35] Schrimpscher v. Stockton, 183 U.S. 290 (1902).

[36] *Id.* at 296, 299.



transfer was void because it violated a restriction on alienation. When the restriction was later removed, the Indian heirs were required to bring their claim within the time period specified by state statutes of limitations. The later removal of the restriction did not change the nature of the illegal transfer, but it did make state statutes of limitations apply. And, even though the transfer in issue had been void for violation of the restriction on alienation,[37] statutes of limitations barred the claim to recover the land.

The Court's decision in *Felix* v. *Patrick*,[38] similarly demonstrates that an Indian claim for land "wrongfully alienated" may be barred, even if the transfer at issue was void for violation of a restriction on alienation, contrary to the Eighth Circuit's decision. The Court applied laches to a claim for land by the heirs of an Indian who had transferred land rights in the form of scrip in violation of a restriction on alienation. The Court acknowledged that the land rights had been obtained from the Indian in violation of a federal statute that provided that no transfer or conveyance of those rights would be valid.[39] Nevertheless, the Court affirmed dismissal of the case because the plaintiffs could not prove that the defendant and his grantees had participated in defrauding the Indian, and because innocent persons had developed and transformed the land at issue into extremely valuable property in the 28 years that had elapsed since the illegal transfer.

Lower courts have followed *Schrimpscher* and *Felix* in applying statutes of limitations and laches defenses to Indian land claims. Most recently, in *Dennison* v. *Topeka*

[37] The Court said that the deed from the allottee "was clearly void." *Schrimpscher*, 183 U.S. at 294.

[38] *Felix* v. *Patrick*, 145 U.S. 317 (1892).

[39] *Id.* at 325-6, 334.

*Chambers Industrial Dev. Corp.*[40] the Tenth Circuit Court of Appeals held, among other things, that a claim to recover former Indian lands was barred by state statutes of limitations which began to run against the claim once restrictions on alienation of the land had ended.

Three related decisions by the Tenth Circuit Court of Appeals concerning a series of illegal purchases of Indian allotments, *United States* v. *Debell*,[41] *United States* v.

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[40] Dennison v. Topeka Chambers Industrial Dev. Corp., 724 F.2d 869 (10th Cir. 1984), *aff'g*, 527 F. Supp. 611 (D. Kan. 1981). Similarly, *see* Armstrong v. Maple Leaf Apartments, Ltd., 622 F.2d 466 (10th Cir. 1979), *cert. denied*, 449 U.S. 901 (1980) (transfer of Indian land in violation of restriction could not be avoided by Indian transferor because laches barred claim); Dillon v. Antler Land Co., 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975) (transfer of Indian land in violation of restriction could not be avoided by Indian transferor because state statutes of limitations barred claim); Wolfe v. Phillips, 172 F.2d 481 (10th Cir. 1949), *cert. denied*, 336 U.S. 968 (1949) (transfer of Indian land in violation of restriction could not be avoided because state statutes of limitations barred claim).

In each of these cases, the plaintiffs were time-barred, either by a statute of limitation or by laches. Thus, as a result, in each case title to the land remained in the hands of the purchaser or remote grantees in the purchaser's chain of title.

*See also* Duncan v. Andrus, 517 F. Supp. 1, 6 (N.D. Cal. 1977) where, in fashioning relief for a void termination of a reservation, the court protected innocent purchasers of former reservation lands. It directed the Indians who transferred their land to *bona fide* purchasers to pursue claims for monetary relief against the United States. And *see* Pechanga Band of Mission Indians v. Kacor Realty, Inc., No. CU-78-4499-MML, slip op. at 9 (C.D. Cal. Aug. 22, 1980), *aff'd on other grounds*, 680 F.2d 71 (9th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 817 (1983) (Indian claim for land barred as to *bona fide* purchasers). And *see* Fife v. Barnard, 186 F.2d 655 (10th Cir. 1951) (transfer of Indian land in violation of restriction could not be avoided by Indians' heirs because defendants held superior title under applicable adverse possession statute).

[41] United States v. Debell, 227 F. 760 (1915).



*Debell*,[42] and *United States* v. *Debell*,[43] also highlight the Eighth Circuit's erroneous interpretation of *Ewert* v. *Bluejacket*. In these decisions the Tenth Circuit sharply distinguished between the remedies available in an action to recover restricted Indian lands, depending upon whether the wrongdoer still held the land. The Court allowed recovery of the land from the wrongdoer when he still held the land, but it allowed only recovery of compensation from the wrongdoer when the land had passed from him to an innocent purchaser. In each of these cases, the United States sought to cancel a land patent to an Indian in order to void a transfer of an Indian's land to Debell, an Indian trader, who colluded with others to defraud various Indians of their lands. The Indian allotments had been subject to restrictions on alienation, but the conspirators misrepresented the competence of each Indian in order to obtain fee patents which Debell then bought. In one case the government successfully recovered the land from Debell and cancelled the fee patent, so that the Indian and the land were returned to their original position.[44] In the other cases, however, Debell had already sold the land to persons who had purchased it in good faith, without knowledge of the circumstances in which it was obtained from the Indian. The court of appeals ruled that the innocent land purchasers held superior title. The United States could not recover the land for the Indian, although it could seek monetary compensation from Debell, the wrongdoer.[45]

The federal government has acted on the understanding that "wrongfully alienated" Indian lands may be recovered, *if* they are still in the hands of the wrongdoer.

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[42] United States v. Debell, 227 F. 771 (1915).

[43] United States v. Debell, 227 F. 775 (1915).

[44] *Debell*, 227 F. 775. *Accord*, Smith v. Stevens, 77 U.S. (10 Wall.) 321 (1870) (deed from Indian in violation of restriction held void in the hands of participant in illegal transfer).

[45] *Debell*, 227 F. 760; *Debell*, 227 F. 771.

In *Heckman* v. *United States*,[46] the Court held that the United States could maintain suit on behalf of Indian allottees to set aside conveyances of restricted Indian allotments where the United States was suing the initial grantees who participated in the illegal transactions. Significantly, the United States brought suit in this and more than 300 similar cases promptly, within one to five years after the illegal conveyances, while recovery from the original grantees was possible.[47]

In cases determining rights to real estate, the term "void" is used in two senses—first to mean a transaction where no interest was in fact transferred[48] and second to mean a transaction where the transfer was illegal but nevertheless conveyed an interest which could be avoided in some, but not all, circumstances.[49] Statutes of limita-

[46] Heckman v. United States, 224 U.S. 413 (1912).

[47] *Id.* at 415-17.

[48] In a transaction void in the first sense, the ostensible grantee receives no title or interest because the grantor, in fact, has none to give. Even if the grantee in turn sells his purported interest to one who purchases the land for value and in good faith, the innocent purchaser receives nothing because the grantee received nothing from the original grantor. *E.g.*, Sampeyreac v. United States, 32 U.S. (7 Pet.) 222 (1883) (Court held that a forged deed gave no right to the grantee and that a transfer from the grantee, in turn, conveyed nothing); Dodge v. Briggs, 27 F. 160, 166-7 (S.D. Ga. 1886) (contrasting the situation where a vendor has no title at all with the situation where the original transfer may have been void for fraud but where the vendor held an interest that could pass to a *bona fide* purchaser). *See generally* Missouri, Kan. & Tex. Ry. v. Kansas Pac. Ry., 97 U.S. (7 Otto) 491 (1878) (in dispute over two railway grants covering same land, the second grantee received nothing because the United States no longer had any title to convey); Pettibone v. Cook County, Minnesota, 120 F.2d 850, 855 (8th Cir. 1941) (although the United States had issued a land patent for certain islands in 1884, the islands had belonged to Canada since 1783).

[49] A transaction that is void in the second sense is voidable. It may be determined to have been void and then treated as void in



tions, laches and the *bona fide* purchaser doctrine may bar a claim based on a transaction void in the second sense, while other defenses such as adverse possession may bar a claim based on a transaction void in the first sense.[50]

Where Indian lands are "wrongfully alienated," the transaction is void in the second sense. The Indians hold an interest in the land that they may transfer even if the transfer violates special restrictions and even if the Indians are defrauded in the process.[51] The transfer may be avoided in an action against the participant in the illegal transaction—if no statute of limitation has run on the claim—but such a transfer does not give Indians a perpetual right to recover the land from every person who later holds an interest in it.

For example, the Court noted in *Schrimpscher* that the original allottee had held an interest in the land which he had only been prevented from conveying by the restriction on alienation and that such restrictions were to

appropriate circumstances, where no statute of limitation has run against the claim. For example, a fraudulent conveyance may be declared void, and, if the land is held by the person responsible for the fraud, it may be recovered. However, if the land has passed to a *bona fide* purchaser the person who was defrauded cannot recover the land from the BFP. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 132-4 (1810). *See also* Wright-Blodgett, Co. v. United States, 236 U.S. 397 (1915); United States v. Detroit Timber and Lumber Co., 200 U.S. 321 (1906); United States v. California and Oregon Land Co., 148 U.S. 31 (1893); Colorado Coal and Iron Co. v. United States, 123 U.S. 307 (1887).

[50] *E.g.*, Kasey v. Molybdenum Corp. of Am., 336 F.2d 560 (9th Cir. 1964) (where plaintiffs argued that statute of limitation had not run on mining claim because they had retained title; but court held that even if transfer was fraudulent it was merely "voidable" and statute of limitation applied).

[51] *See generally Felix*, 145 U.S. at 335. *See also Duncan*, 517 F. Supp. at 6 (declaring that unauthorized transfers of restricted Indian land were not "voidable" in the hands of "non-Indian good faith purchasers.").

prevent Indians from being defrauded of the land.[52] The Court then carefully distinguished between the transaction at issue, which was void for violation of a restriction an alienation, and a transaction based on forgery, where the purported seller of land held no interest in the property and had nothing to transfer.[53] In so doing, the Court implicitly recognized that the statute of limitation defense was effective as to the type of transaction that violated a restriction but might not be with respect to the type of transaction that involved forgery.[54] The Court specifically rejected the argument adopted by the Eighth Circuit that no statute of limitation can apply to an Indian land claim based on an alleged violation of a restriction on alienation.

This also explains the result in *Ewert*, where the land could be recovered from the person who defrauded the Indian allottee but the innocent mortgagee held an enforceable lien on the property. A conveyance of Indian land in violation of a restriction on alienation, like any fraudulent conveyance, may be avoided in appropriate circumstances and the land recovered from the wrongdoer.[55] Similarly, in the *Debell* decisions where the

[52] *Schrimpscher*, 183 U.S. at 299.

[53] *Id.*

[54] *See, e.g., Kasey*, 336 F.2d at 568 (distinguishing between a deed void for fraud and a deed void because of forgery, and applying statute of limitation to claim based on the first type of deed). *See also* Begay v. Albers, 721 F.2d 1274 (10th Cir. 1983) (Indian claims to recover allotments were permitted to proceed because purported transfers of their interests were merely forgeries). *Cf.* Ewert v. Bluejacket, 259 U.S. at 138, where the Court noted that Ewert, the wrongdoer *had* received legal title to the Indian allotments he illegally purchased but the Court denied him the benefit of laches. Ewert's interest was treated as inferior to the equitable interest asserted by the Indian plaintiff, but the innocent mortgagee's interest was given effect.

[55] Where the perpetrator of the fraud still holds the land, a plaintiff's remedies include recovery of the land. *E.g., Exploration*, 247 U.S. at 447 ("To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.") (*quoting* from Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874)).



wrongdoer still held the land wrongfully obtained from the Indian, the transaction could be avoided. Where Debell had transferred the land to a *bona fide* purchaser, the innocent third party received an interest in the land and, because of his BFP status, it was superior to the rights asserted on behalf of the Indian allottee.

Thus, a transfer of Indian lands in violation of a restriction on alienation may be avoided in some circumstances but not in others, and the Eighth Circuit erred in holding that a statute of limitation cannot apply to this plaintiff's action simply because the plaintiff alleges that the transfer at issue was void. The court of appeals more appropriately should have addressed whether the claim is subject to a statute of limitation and whether the plaintiff is barred by laches.

### IV. A Generally Applicable Federal Statute Of Limitation Can Apply To An Indian Land Claim.

The Eighth Circuit refused to apply any federal statute of limitation solely because the federal government has a general policy of protecting Indian lands.[56] In so doing, the court of appeals first erroneously declared that neither state statutes of limitations nor the doctrine of laches can ever bar a claim to recover "wrongfully alienated" former Indian lands.[57] By analogy, it then concluded that no existing federal statute of limitation can apply to such a claim. Citing no precedent, the court of appeals declared that Congress would have to provide spe-

[56] *Mottaz*, 753 F.2d at 74.

[57] *Id.* *See* the discussion above at 16-18 and n.40 for examples of the application of state law to certain Indian land claims.

cifically that a claim such as this is subject to a federal statute of limitation.[58] The court of appeals erred because its analysis of the law relating to Indians and Indian land claims was too superficial and because it failed to account for other equally strong federal policies and doctrines which are consistent with the application of a federal statute of limitation to an Indian land claim.

It is quite true that Indians generally hold a special status under federal law. The United States has asserted plenary authority over Indians,[59] and, ever since the seminal case of *Cherokee Nation* v. *Georgia*,[60] the resulting relationship between the federal government and Indians has been described as a "trust" relationship with the government functioning as "guardian" for its Indian "wards." [61] Pursuant to its special role in Indian affairs, the federal government has imposed a variety of general and particular restrictions on Indians and Indian lands.[62] Where there is a conflict between the application of state law to Indians and their lands and the special provisions

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[58] *Mottaz*, 753 F.2d at 74.

[59] *E.g.*, United States v. Sioux Nation, 448 U.S. 371 (1980); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

[60] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

[61] *E.g.*, Seminole Nation v. United States, 316 U.S. 286, 296-7 (1942); *Heckman*, 224 U.S. at 434; *Felix*, 145 U.S. at 330-31; United States v. Kagama, 118 U.S. 375, 383-4 (1886); Chouteau v. Moloney, 57 U.S. (16 How.) 203, 237-8 (1853).

[62] *E.g.*, the Nonintercourse Act, now codified at 25 U.S.C. § 177 (1982) (restricting alienation of tribal lands); the General Allotment Act of 1887 (Dawes Act), now codified at 25 U.S.C. § 331 *et seq.* (1982) (allotments to individual Indians authorized with trust period preventing alienation); the Indian Reorganization Act of 1934, now codified at 25 U.S.C. § 461 *et seq.* (1982) (trust period extended restricting alienation of allotments).



that the federal government has made for their protection, federal law prevails.[63]

However, decisions that state law time bars may not apply to certain Indian claims based on the supremacy of federal law in Indian affairs do not dictate what law the federal government may apply.[64] There is no conflict between state and federal law in a case such as the one now before the Court, which involves only federal actions and federal laws.

The Eighth Circuit seems to suggest that the federal government's general policy of protecting Indian lands conflicts with the application of a federal statute of limitation to this claim. But application of a general federal statute of limitation to a claim for land which the federal government itself has purchased and removed from Indian ownership hardly creates a conflict in federal policy relating to the specific tract of land. The general

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[63] County of Oneida v. Oneida Indian Nation (*Oneida II*), —— U.S. ——, 105 S.Ct. 1245 (1985) (Congress had specifically provided that state law would not apply to pre-1952 claims in enacting a statute that otherwise gave state courts civil jurisdiction over Indians); Schrimpscher v. Stockton, 183 U.S. 290 (1902) (restriction on alienation had been removed and federal trusteeship ended, so state statutes of limitations could apply to Indian claim without conflicting with federal law); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (the United States may preempt the application of state law to Indians); United States v. Heath, 509 F.2d 16 (9th Cir. 1974) (state law applied to Indian when federal government ended special status).

*Cf.* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 673-76 (1979) (state rules concerning accretion and avulsion held applicable to Indian land claim because states and private landowners had reasonably relied on state law in purchasing property and no overriding federal interest was threatened.).

[64] *See* Big Spring v. United States Bureau of Indian Affairs, 767 F.2d 614, 617 (9th Cir. 1985) (six-year federal statute of limitation for claims against the United States applied to Indian claim despite special trust relationship with federal government); Christensen v. United States, 755 F.2d 705 (9th Cir. 1985) (same).

federal policy of protecting Indian lands is irrelevant where the federal government has decided that the land in issue is no longer Indian land. *See Grosz* v. *Andrus*,[65] where the court held that the general federal statute of limitation for quiet title actions against the United States applied to a claim by Indians that an easement granted over 30 years before was invalid.

Moreover, the Eighth Circuit ignored other equally strong federal policies to reach its result. As the Tenth Circuit explained in applying the twelve-year federal statute of limitation for quiet title actions in *Stubbs* v. *United States*,[66] sovereign immunity protects broad federal interests, and waivers of that immunity should be narrowly construed. In particular, the courts should avoid a construction of the law that would allow claims to quiet title against the United States "no matter how ancient." [67]

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[65] Grosz v. Andrus, 556 F.2d 972 (9th Cir. 1977). Similarly, *see Big Spring*, 767 F.2d 614 (Indian mineral rights claim barred by six-year federal statute of limitation on civil actions against United States where government had previously given rights to others); *Christensen*, 755 F.2d 705 (Indian claim for access to allotment barred by six-year federal statute of limitation); Lemieux v. United States, 15 F.2d 518 (8th Cir. 1926), *cert. denied*, 273 U.S. 749 (1927) (Indian land claim barred by laches where the federal government had disposed of the land the plaintiff contended was his). Similarly, *see* Mann v. United States, 399 F.2d 672 (9th Cir. 1968) (general federal statute of limitation for actions under Federal Tort Claims Act barred claim by Indian).

[66] *Stubbs*, 620 F.2d at 780.

[67] *Id.*



## CONCLUSION

The court of appeals' decision that no federal statute of limitation can apply to the plaintiff's claim was erroneous for all of the reasons set forth above. The decision should be reversed.

Respectfully submitted,

JOHN C. CHRISTIE, JR.
Counsel of Record
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
*Attorneys for the American Land Title Association*

Dated: January 9, 1986

No. 85-546

In The
# Supreme Court of the United States
October Term, 1985

—o—

UNITED STATES OF AMERICA, PETITIONER,

v.

FLORENCE BLACKETTER MOTTAZ, ETC.,
RESPONDENT.

—o—

**On Writ of Certiorari**
**To The United States Court of Appeals**
**For The Eighth Circuit**

—o—

## BRIEF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT MOTTAZ

—o—

Paul E. Frye
Counsel of Record
200 Lomas Blvd., N.W.
Suite 815
Albuquerque, NM 87102
(505) 247-9592

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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## INTEREST OF THE AMICUS CURIAE

The Navajo Tribe of Indians is a federally-recognized Indian tribe with both proprietary and sovereign interests in its territory within the states of Arizona, Utah, and New Mexico. *See, Kerr-McGee Corp. v. Navajo Tribe of Indians,* — U.S. —, 105 S. Ct. 1900 (1985).

Although most of the Navajo Indian country has remained as land held in trust by the United States for the Navajo Tribe as a whole, a portion of the Navajo reservation was allotted to individual tribal members in the early part of this century, as required by section 25 of the Act of May 29, 1908, ch. 216, 35 Stat. 444, 457. In addition, public domain lands adjacent to the Navajo reservation were granted in trust to members of the Navajo Tribe under section 4 of the General Allotment Act.[1] These lands are administered for the federal government by the Eastern Navajo Agency of the Bureau of Indian Affairs. The allottees in this area have maintained their tribal relations, and governmental services are provided primarily by the Navajo Tribe. The Office of Hearings and Appeals of the Department of the Interior has determined that all of the allotments, in both the 1908 reservation and the remainder of the Eastern Navajo Agency, are subject to the civil and regulatory jurisdiction of the Navajo Tribe. Thus, the Navajo Tribe of Indians is now the beneficial owner of fractional beneficial interests in many trust allotments, pursuant to the "escheat" provisions of the Indian Land Consolidation Act,[2] and has a reversionary interest in all allotments made within Navajo Indian Country.[3] The Tribe's present fractional ownership of allotments, its

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[1]Act of Feb. 8, 1887, ch. 119, § 4, 24 Stat. 389; 25 U.S.C. § 334.

[2]Pub. L. 97-459, Title II, § 207, Jan. 12, 1983, 96 Stat. 2519, amended Pub. L. 98-608, § 1(4), Oct. 30, 1984, 98 Stat. 3172; 25 U.S.C. § 2206.

[3]The Navajo Tribe is aware that the issue of the constitutionality of 25 U.S.C. § 2206 with respect to Sioux allotments is

(Continued on following page)

reversionary interests in the approximately 6,000 trust allotments in New Mexico, and its unique relationship with tribal member-allottees give the Tribe significant interests in preserving the Congressional plan for protection of Indian allotted lands.

That continued adherence to the Congressional scheme is needed is shown by two cases of the United States Court of Appeals for the Tenth Circuit. In *Vicenti v. United States,* 470 F.2d 845 (10th Cir. 1972), *cert. dis'd.* 414 U.S. 1057 (1973), individual Navajo allottees sued to recover possession of trust allotments which executive officers of the United States had purported to grant to a non-Indian rancher some twenty-three years earlier. The trial judge, while determining that 25 U.S.C. §§ 345-346 did not grant jurisdiction for recovery of money damages against the United States, entered judgment vesting exclusive beneficial title in the Navajo allottees, noting that the executive officers within the Department of the Interior had

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(Continued from previous page)

before this Court in *Hodel v. Irving,* No. 85-637. The Eighth Circuit's decision, *Irving v. Clark,* 758 F.2d 1260 (8th Cir. 1985)—which the Navajo Tribe finds difficult to square with the reasoning of *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1976)—noted that the allotments were in the nature of a bargain, *Irving, supra,* at 1268, and that the bargain struck with the Sioux included enforceable expectations that the allottees would be able to control the disposition of the allotments at death. *Id.,* at 1268-69 and 1266 n.10. No such promises were made to the allottees in the 1908 reservation or other areas in the Eastern Navajo Agency. Thus, regardless of the outcome of *Hodel v. Irving,* 25 U.S.C. § 2206 will not invade constitutionally protected rights of Navajo allottees. *See,* Kornstein, *Inheritance: A Constitutional Right?* 36 Rut. L. Rev. 741, 789-91 (1984), listing decisions in forty-nine of the fifty states, and the District of Columbia, which hold that there exists no natural or inherent right to inheritance.



perpetrated a "cruel hoax" against the Navajos. *See, id.,* at 847. The trial court's judgment was affirmed.

More recently, in *Begay v. Albers,* 721 F.2d 1274 (10th Cir. 1983), the Tenth Circuit addressed the issue of whether the approval by employees of the BIA of forged deeds to allotments effectively terminated the trust status of the allotted lands, such that the actions were barred by statutes of limitations.[4] The Tenth Circuit correctly held that the approvals of forgeries by the BIA officials were absolutely null and void,[5] and that title to the allotments—despite the approval of the 1946 forgeries—had "remained in the United States in trust for [the allottees'] use and benefit."

Non-Indians, often in conjunction with BIA employees, have been able to perpetrate such "cruel hoaxes" on Navajo allottees because of the extremely low educational level of allottees in Navajo Indian country. Despite the promises made in Article VI of the Treaty of 1868,[6] the federal government has made no serious attempt to provide schooling in Navajo Indian country until the 1960's.[7] Nor has

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[4]Notably, the Justice Department, although it vigorously defended the action in the trial court, *supported* the allottees in the Court of Appeals once a factual finding had been made by the trial courts that the deeds had been forged. *See,* Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 315 & n. 277.

[5]*See,* 25 U.S.C. § 348.

[6]" . . . the United States agrees that, for every thirty children between said ages [of six and sixteen] who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher."

[7]Indeed, a report of Special Agent Donaldson which noted the "default" of the government's obligation to educate Navajos was included in the legislative history of the Indian Appropriations bill which was passed with the provisions of what is now 25 U.S.C. § 345. 26 Cong. Rec. 7703 (July 19, 1894). It had been stated earlier that "[i]n other cases, like that of the Navajoe tribe, with 3,000 children, they have only one school." 26 Cong. Rec. 5926 (June 7, 1894).

the state of New Mexico provided schooling to Navajos.[8] As a consequence, the Navajo allottees are easy prey for those who would use trickery to separate them from their trust property, and then convince them that their remonstrances will be futile, because of BIA approval. *See, e.g., New Mexico Navajo Ranchers Association v. I.C.C.*, 702 F.2d 227, 231 (1983), where the court of appeals summarized the allegations of misrepresentations by agents of the Star Lake Railroad (a subsidiary of the Santa Fe-Southern Pacific Railway Company) used to induce allottees to sign right-of-way consent forms.[9]

The low education level of adult Indians, the sometimes staggering workload imposed on BIA officials, and the willingness of some unscrupulous persons and business entities to exploit these circumstances demonstrate the importance of preserving the Congressional plan regarding protection of allotted lands from the consequences of actions taken in violation of federal law. It cannot be emphasized enough that the rights sought to be vindicated by Respondent Mottaz are not simply the proprietary rights of the allottee, but governmental rights of the United States. *See, e.g., Heckman v. United States*, 224 U.S. 413, 437-38 (1912). And it is Congress, not the Executive Branch, with plenary power over Indian lands. *Begay v. Albers, supra*, 721 F.2d at 1281, *citing Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The position taken by the Department of Justice in this litigation is inconsistent with the national interest.

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[8] *See, Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 834 n.1 (1982), referring to the "tribal children abandoned by the State."

[9] This massive fraud, involving over 400 allottees and heirs to allotments, would have likely gone unnoticed, had an allottee who had once been a state senator not been present at a meeting where it was suggested that allottees could face jail sentences if they did not consent to the grant of a right-of-way.



The attempt of the Justice Department and of the American Land Title Association ("ALTA") to ignore the special body of Indian law enacted by Congress should not be honored. The fundamental interests of the United States, as set forth by Congress, are entirely consistent with those of Respondent Mottaz, and are not—as suggested by the Justice Department and ALTA—consistent with the validation of void actions of executive officers by the operation of general statutes of limitations.

This brief, then, shall consider the Congressional plan for allotted lands and how the Congressional intent would be wholly thwarted by adopting the position taken by the Justice Department herein.

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## SUMMARY OF ARGUMENT

Subject matter jurisdiction in actions by allottees to protect their interests in trust property is conferred on the federal district courts by 25 U.S.C. § 345. This conclusion is compelled by the plain language of § 345, its legislative history, and eighty years of decisions of this Court and the Courts of Appeals.

No statute of limitations will bar actions by allottees to protect their beneficial ownership or possessory interests in trust land. The Congress has consistently manifested its intention that such actions against the United States not be precluded by the operation of statutes of repose. The same reasoning—embraced by all of the Justices—which led to the determination that "[t]here is no federal statute of limitations governing federal common law actions by Indians to enforce property rights"[10] leads

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[10] *County of Oneida v. Oneida Indian Nation*, — U.S. —, 105 S. Ct. 1245, 1255 (1985). *See, id.*, at 1263.

almost inescapably to the conclusion that no federal statute of limitations bars an allottee's claim for possessory or beneficial ownership rights in a trust allotment.

The statutes invoked in the brief of the United States do not apply, in light of the national interest expressed by Congress in protecting trust lands of Indian allottees. Indeed, 28 U.S.C. § 2409a is by its very terms inapplicable. Application of the six-year limitations period of 28 U.S.C. § 2401(a) would both frustrate the Congressional purpose and lead to absurd results.

The decision below, remanding the matter for factual findings, is proper. If the actions of the executive officers in purporting to terminate Mrs. Mottaz' interest in the allotment were contrary to the Congressional plan, they are void. If the purported conveyance was thus void, Mrs. Mottaz retains her beneficial interest in the land, and no statute of limitations is applicable with respect to her claim for beneficial interests in the land.

## ARGUMENT

### I. ACTIONS FOR ALLOTMENTS UNDER 25 U.S.C. § 345 INCLUDE ACTIONS TO PROTECT THE INTERESTS OF THE ALLOTTEE AFTER THE ACQUISITION OF THE ALLOTMENT.

#### A. Both The Language Of 25 U.S.C. § 345 And Settled Rules of Construction Compel The Conclusion That Actions Brought Pursuant To 25 U.S.C. § 345 Are Not Limited To Actions To Obtain Allotments In The First Instance.

The inquiry into the jurisdictional grant of 25 U.S.C. § 345 must, of course, begin with the language of the statute itself. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 265



(1981). The language of 25 U.S.C. § 345 includes the following:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, *or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled* by virtue of any Act of Congress, may commence and prosecute *or defend*[11] any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States . . . .

(Emphasis added.) Congress thus included in the jurisdictional grant of § 345 not only actions for allotments in the first instance, but also actions to redress unlawful exclusions from allotments previously acquired. Consent by the United States to suit in all actions authorized in § 345 is found in 25 U.S.C. §§ 345 and 346.[12]

The construction of 25 U.S.C. § 345 offered by the Justice Department herein would violate at least three fundamental rules of statutory construction. First, the brief of the United States must ignore the plain language used by Congress: *i.e.*, "persons . . . who claim to have been unlawfully . . . excluded from any allotment *or* any parcel of land to which they claim to be entitled . . . ." There are undeniably two types of land encompassed in the quoted

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[11] *See, United States v. Fairbanks*, 171 F. 337, 338 (8th Cir. 1909), *aff'd* 223 U.S. 215 (1912).

[12] Section 345 requires that "in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant." Section 346 provides for service of the petition on the Attorney General and the United States attorney, and it allows the United States attorney to file a "notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises . . . ."

language: lands which have been allotted and lands to which Indians merely "claim to be entitled."

Second, the construction offered by the Justice Department would collapse the phrase "any allotment *or* any parcel of land to which they claim to be entitled" to simply "any parcel of land to which they claim to be entitled." In contrast to the approach of the Justice Department, this Court has consistently held that a federal statute must be construed so that no part of it is rendered insignificant or surplusage. *E.g., Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979):

> In construing a statute we are obliged to give effect, if possible, to every word Congress used. • • • Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise . . . .

(Citation omitted.)

Third, the strained and crabbed construction offered in the Brief of the United States would render largely hollow the right of an allottee to the "quiet possession" of her allotment.[13] The allottee, under the theory of the Justice Department, could bring suit against the United States to obtain the allotment initially, but would be unable to protect her beneficial rights, at least as against the United States,[14] from that day forward. Not only would this construction be inconsistent with the language of § 345, as shown above, but it would also violate the "eminently sound and vital canon" of statutory construction that statutes passed for the benefit of Indians are to be liberally

[13] *See, New Mexico Navajo Ranchers Association v. I.C.C.,* 702 F.2d 227, 233 (D.C. Cir. 1983).

[14] The Justice Department would apparently allow Indian allottees to sue to recover possession of allotments from private parties (presumably, grantees of the United States) regardless of the passage of time, but not the United States itself. See, Brief of the United States, at p. 43, n. 22. Such a suggestion—to subject a good faith purchaser to suit while immunizing a trustee in possession—finds no support in law, policy or equity.



construed and all doubts are to be resolved in the Indians' favor. *See, Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 655 n. 7 (1976). As the Solicitor has recognized:

> It is familiar law that allotment acts should be construed in view of their purpose to promote the welfare of the Indian wards. *Levindale Zinc Mining Co. v. Coleman* (241 U.S. 432, 437).

*Fort Peck Allotments,* I *Op. Sol.* 564, 565 (1935). *Accord, e.g., Antoine v. United States,* 637 F.2d 1177, 1179 (8th Cir. 1981). *See, United States v. Reily,* 290 U.S. 33, 39 (1933).

### B. That 25 U.S.C. § 345 Supports Actions By Allottees To Protect Interests In Allotments Already Granted Is Supported Consistently By Almost Eighty Years Of Case Law.

As the United States concedes, the Eighth, Ninth and Tenth Circuits hold that § 345 provides subject matter jurisdiction in actions to protect interests in trust allotments previously granted. (Brief of the United States, at 42-43, n. 22.) That these appellate decisions correctly reflect the reach of § 345 is strongly supported by cases decided by this Court.

The brief of the United States erroneously relies on ***First Moon v. White Tail,*** 270 U.S. 243 (1926), for the proposition that § 345 only authorizes suits to compel allotments in the first instance. U.S. Br. at 12 and 40-41. *First Moon* held that 25 U.S.C. § 345 provides no subject matter jurisdiction over "disputes concerning the heirs of one who held a valid and unquestioned allotment." *Id.,* at 245. The result in *First Moon* was compelled by the Act of June 25, 1910,[15] which conferred "final and conclusive" authority in the Secretary of the Interior to decide heirship disputes.

[15] Ch. 431, 36 Stat. 855; 25 U.S.C. § 372.

Prior to the Act of June 25, 1910, however, this Court had held differently.[16] In *McKay v. Kalyton,* 204 U.S. 458 (1907), the Court determined that the federal courts, and not the state courts, had jurisdiction under 25 U.S.C. § 345 to adjudicate disputes among heirs concerning the rights to possession of a valid and unquestioned allotment. The Court's reasoning could not have been clearer:

> By this provision [25 U.S.C. § 345], . . . the United States consented to submit its interest in the trust estate *and the future control of its conduct concerning the same* to the result of the decree of the courts of the United States . . . . The subsequent legislation of Congress, instead of exhibiting a departure from this policy, confirms it.[17]

*Id.,* at 469 (emphasis added). *See, Gerard v. United States,* 167 F.2d 951, 954 (9th Cir. 1948).

Similarly, in *Heckman v. United States,* 224 U.S. 413 (1912), the Court discussed the ability of allottees to bring suit under § 345 in the context of an action brought by the United States to cancel conveyances of allotments executed by Cherokee Indians in violation of statutory restrictions.

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[16]See, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), at 314 & n. 266.

[17]In contrast with the views that the 1901 amendment to the 1894 Act confirms a "limited scope" of § 345 (Brief of the United States, at 37), the *McKay v. Kalyton* Court said with respect to the 1901 amendment:

> Nothing could more clearly demonstrate . . . the conception of Congress that the United States continued, as trustee, to have an active interest in the proper disposition of allotted Indian lands, and the necessity of its being made a party to controversies concerning the same, for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject.
>
> *The suggestion made in argument that the controversy here presented involved the mere possession, and not the title, to the allotted lands is without merit, since the right of possession asserted of necessity is dependent upon the existence of an equitable title in the claimant under the legislation of Congress to the ownership of the allotted lands.*

*Id.,* emphasis added.



Quoting from *Re Heff,* 197 U.S. 488, 509 (1905), the Court stated:

> In *United States v. Rickert,* 188 U.S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478, we sustained the right of the government to protect the lands thus allotted and patented from any encumbrance of state taxation. *Undoubtedly an allottee can enforce his right to an interest in the tribal or other property* (for that right is expressly granted) . . . .

*Id.,* at 441 (emphasis added).

Decisions of this Court relied on in the Brief of the United States do not hold differently. As was noted above, *First Moon* concerned an heirship dispute which Congress in 1910 had entrusted to the "final and conclusive" jurisdiction of the secretary. *Arenas v. United States,* 322 U.S. 419 (1944), mandated the issuance of "trust patents"[18] some 17 years after allotment schedules had been completed, and in spite of a change in policy by the Department of the Interior. The question of whether 25 U.S.C. § 345 encompassed actions seeking to protect beneficial rights in trust property already granted did not need to be, and was not, decided in *Arenas.* The third and final Supreme Court decision relied on by the United States is *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), where the plaintiff sought distribution of tribal minerals to mixed-blood Utes. The holding that 25 U.S.C. § 345 provided no subject matter jurisdiction for such an action was predicated on the fact that the mineral estate was not even alleged to have been subject to allotment nor appurtenant to any allotment. *Id.,* at 142-43. Thus, *Affiliated Ute* had no occasion to consider whether § 345 conferred jurisdiction over actions to protect either lands

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[18]As the Court has noted, the term "trust patent" is a rather consistently used misnomer. *See, United States v. Rickert,* 188 U.S. 432, 436 (1903).

previously allotted or, indeed, interests "appurtenant" to such allotments.

The reasoning of *McKay v. Kalyton* and *Heckman v. United States* has been followed consistently for almost forty years by the Courts of Appeals. *See, e.g., Gerard v. United States,* 167 F.2d 951 (9th Cir. 1948), *Scholder v. United States,* 428 F.2d 1123 (9th Cir. 1970), *cert. den.* 400 U.S. 942 (1970), *Fontenelle v. Omaha Tribe,* 430 F.2d 143 (8th Cir. 1970), *Begay v. Albers,* 721 F.2d 1274 (10th Cir. 1983). And none of the Courts of Appeals decisions relied on by the United States (U.S. Br. at 42-43 n. 22) holds that suits to protect ownership or possessory interests in land previously allotted are unauthorized by 25 U.S.C. § 345. In *Coleman v. United States Bureau of Indian Affairs,* 715 F.2d 1156 (7th Cir. 1983), and *Harkins v. United States,* 375 F.2d 239 (10th Cir. 1967), the plaintiffs were members of the Five Civilized Tribes who sought only money damages, raising no "question about land titles." *Harkins,* at 242. *Vicenti v. United States,* 470 F.2d 845 (10th Cir. 1972), *cert. dis'd* 414 U.S. 1057 (1973), hardly supports the Justice Department here. The Tenth Circuit in *Vicenti,* while denying monetary relief against the United States, *affirmed* the judgment of the district court, vesting exclusive title to the allotments in the Indians. The *Vicenti* court restated with no apparent qualms that sections 345 and 346 were available "to clear any cloud on the title of the allotted lands," *id.,* at 847, and it cited to its decision in *Affiliated Ute Citizens of State of Utah v. United States,* 431 F.2d 1349 (1970), *aff'd* 406 U.S. 128 (1972), which had stated that 25 U.S.C. § 345 was "obviously intended to provide relief to the Indians entitled to possession of allotments and similar interests." Finally, the Ninth Circuit has expressly repudiated the dictum in *United States v. Eastman,* 118 F.2d 421 (9th Cir. 1941),



*cert. den.* 314 U.S. 635 (1941), relied on by the United States here. *Gerard v. United States,* 167 F.2d 951, 954 n. 3 (9th Cir. 1948).

The language of § 345, the rules of statutory construction, and eighty years of jurisprudence all support the view that Congress intended that Indian allottees be able to protect in federal courts their proprietary and possessory interests in allotments which had been granted to them. Neither the strained construction of § 345, nor the isolated snippets of legislative history, nor the series of dubious negative pregnants offered in the Brief of the United States provides significant support for reversing the consistent interpretation of § 345 by this Court and the Courts of Appeals.

## II. THERE IS NO APPLICABLE STATUTE OF LIMITATIONS FOR ACTIONS BY ALLOTTEES TO PROTECT POSSESSORY INTERESTS IN TRUST ALLOTMENTS.

### A. The Applicability Of General Statutes Of Limitations Must Be Determined With Reference To Congressional Policy, The Protections Guaranteed By The Allotment Statutes, And The Trust Relationship.

Indian lands had been allotted as early as 1633.[19] Early experiments in the allotting of Indian lands generally ended in failure, in large part due to the rapid loss of the Indian lands.[20] *See,* Comm. on the Territories, H.R. Rep. No. 188, 45th Cong., 3d Sess. (1879); Com'r. Ind. Aff. Ann. Rep. Doc. No. 1, 45th Cong., 3d Sess. 442-45.

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[19] F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 129.

[20] *Id.,* at 130.

However, "[p]roponents of allotment blamed the failure chiefly on the alienability of allotments, asserting that the results would differ if the lands were made inalienable."[21]

As a result, the General Allotment Act provided that the United States hold the land "in trust for the sole use and benefit of the Indian" for a 25-year period. 25 U.S.C. § 348. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 368 (1968). The new allotment system had a "dual purpose," *id.*, at 369, to "safeguard Indian land and at the same time 'to prepare the Indians to take their place as independent, qualified members of the modern body politic.'" *Ibid.*, quoting *Board of County Commissioners v. Seber*, 318 U.S. 705 (1943). During the trust period, the United States "retain[s] the power to scrutinize the various transactions by which the Indian might be separated from that property"[22] and "possesses a supervisory control over the lands and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restrictions."[23]

Although Congress initially determined that individual Indian allottees would require 25 years to become sufficiently educated and acculturated before restrictions on alienation would be unnecessary, it became apparent that additional time would be needed in many instances. *See, e.g.*, Act of June 21, 1906, c. 3504, 34 Stat. 326, 25

[21] *Ibid.* (Footnote omitted.)

[22] *Poafpybitty v. Skelly Oil Co.*, 390 U.S. at 369.

[23] *United States v. Bowling*, 256 U.S. 484, 487 (1921) (footnote omitted).



U.S.C. § 391; Act of February 26, 1927, c. 215, 44 Stat. 1247, 25 U.S.C. §§ 352a and 352b. *See, Heckman v. United States*, 224 U.S. 413 (1912), *United States v. Jackson*, 280 U.S. 183 (1930). The trust period has been "repeatedly extended." *Poafpybitty*, at 368. Restrictions on alienation of allotments have been the cornerstone of the allotment system to this day, as Congress, in passing the Indian Reorganization Act,[24] extended indefinitely the trust period for all allotments. 25 U.S.C. § 462. *Poafpybitty*, at 368 n. 6, *Begay v. Albers*, 721 F.2d 1274, 1279 (10th Cir. 1983).

Until restrictions on alienation are validly removed, "any conveyance . . . of the lands set apart and allotted as herein provided, or any contract made touching the same . . . shall be absolutely null and void." 25 U.S.C. § 348. Congress has provided no exception in § 348 for conveyances which are unlawful because of unauthorized actions of executive officers of the federal government. *See, United States v. Watashe*, 102 F.2d 428, 430-31 (10th Cir. 1939), *Bacher v. Patencio*, 232 F. Supp. 939, 941 (S.D. Cal. 1964), *aff'd* 368 F.2d 1010 (9th Cir. 1966).

Congress has allowed the sale and leasing of allotments by the allottees, under safeguards authorized by Congress. *See, e.g.*, 25 U.S.C. § 405, 25 U.S.C. § 396. But a sale or a lease of an allotment—even if approved by the Secretary of the Interior—is absolutely void without the informed consent of the allottees. *Mott v. United States*, 283 U.S. 747, 751 (1931), *Jennings v. Wood*, 192 F. 507,

[24] Act of June 18, 1934, ch. 576, 48 Stat. 984; codified as amended at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479.

508 (8th Cir. 1911) (cited with approval in *Mott*), *Begay v. Albers,* 721 F.2d 1274 (10th Cir. 1983). Neither the good faith of the conveyee nor the *bona fides* of the transaction may cure the nullity.[25] *United States v. Brown,* 8 F.2d 564 (8th Cir. 1925), *cert. den.* 270 U.S. 644 (1926), *Bacher v. Patencio, supra,* 232 F. Supp. at 941 (citing cases).

ALTA expressly, and the United States by inference, argue that the violation of the Congressional will alleged by Respondent Mottaz is no more significant than the "equally strong" federal policy embodied in general statutes of repose.[26] In *Squire v. Capoeman,* 351 U.S. 1 (1956), the Justice Department made a similar argument. There, an Indian allottee sought a refund from the United States of taxes paid on the sale of timber from his allotment, alleging that the imposition of such taxes violated 25 U.S.C § 348. The Justice Department urged the Court

> to view this case an an ordinary tax case without regard to the treaty, relevant statutes, congressional policy concerning Indians, or the guardian ward relationship between the United States and these particular Indians.

*Id.,* at 5-6. Although agreeing that "exemptions to tax laws should be clearly expressed," the Court rejected the argument of the government's attorneys and held that the proceeds of the timber sales were not taxable.

Congress was delegated plenary authority over Indian affairs. U.S. Const., Art. I, § 8, cl. 3. This plenary authority extends to restricting the alienability of Indian allotments. *Williams v. Johnson,* 239 U.S. 414, 419-20

[25]ALTA recognizes that such void conveyances cannot be given life by the passage of time. Brief of ALTA, at 20 n. 48.

[26]Brief of ALTA, at 26. See Brief of the United States, at 44.



(1915). Plainly, the national interest—as consistently expressed by Congress—is seriously implicated in unauthorized conveyances of trust land. *Heckman v. United States,* 224 U.S. 413 (1912), *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365 (1968). Thus, the determination of whether an allottee may be dispossessed of her trust lands in violation of safeguards established by Congress must be considered in light of the "manifest policy of Congress to protect the Indians against loss of their lands." *See, Drummond v. United States,* 131 F.2d 568, 570 (10th Cir. 1942) (per Phillips). This Congressional policy requires that general statutes of repose not bar actions by trust allottees seeking to protect interests in, or appurtenant to, their trust property.

**B. The Eighth Circuit Properly Examined The Merits In Order To Determine The Applicability Of Statutes Of Limitations.**

The Department of the Interior has long held the view that, so long as property is held in trust for an Indian, statutes of limitations will not bar the Indian from seeking to protect her rights in the trust property.[27] In

[27]This discussion deals only with actions alleging a non-frivolous claim that the property at suit is held in trust by the United States for the plaintiffs, the unauthorized actions of executive officers of the United States notwithstanding. Thus, the following cases cited by the United States (Brief, at 32), where the rights being litigated were not rights to possession and beneficial ownership of trust property, are not germane here: *Loring v. United States,* 610 F.2d 649 (9th Cir. 1979) (damage action for taking of a right-of-way), *Christensen v. United States,* 755 F.2d 705 (9th Cir. 1985), *pet. for cert. pending* No. 85-372 (action predicated on failure to provide access to allotment over public lands), *Big Spring v. United States Bureau of Indian Affairs,* 767 F.2d 614 (9th Cir. 1985) (suit to redress alleged failure of allotting agents to select lands for ancestors prior to Act of Congress of June 30, 1919, § 10, 41 Stat. 3, 17). Similarly, other cases cited by

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the 1958 and 1966 editions of *Federal Indian Law*, at 543, the Department stated, with respect to Indian litigants:

> *Except with respect to restricted property*, they may lose their rights because of laches, and the running of the statute of limitations.

(Emphasis added.) The authoritative 1942 *Handbook of Federal Indian Law*, by Felix Cohen, contains the same language, at 163.

The cases relied on in the Brief of the United States do not hold differently. For example, the court in *Capoeman v. United States*, 440 F.2d 1002 (Ct. Cl. 1971), cited in the government's brief at 31 & n. 18, recognized the "restricted property" exception which it characterized as relating "primarily to suits in which an Indian contests title to land presently or formerly restricted." *Id.*, at 1008. The *Capoeman* court noted that Congress had provided for the application of statutes of limitations in only a limited range of cases concerning trust allotments. *Ibid.* *See*, 25 U.S.C. § 347.

The other cases cited by the Justice Department also support the position that, as to trust land, no statute of limitations should apply. *Cf., Fort Mohave Tribe v. United States*, 210 Ct. Cl. 727, 728 (1926) ("The claim that limi-

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ALTA are not relevant here because Congress expressly allowed for state statutes of limitations to govern actions for formerly restricted lands, *Schrimpscher v. Stockton*, 183 U.S. 290, 296-97 (1902), *Wolfe v. Phillips*, 172 F.2d 481, 484 & n. 3 (10th Cir. 1949), *cert. den.* 336 U.S. 968 (1949), *Fife v. Bernard*, 186 F.2d 655, 661-62 (10th Cir. 1951), *Armstrong v. Maple Leaf Apartments, Ltd.*, 622 F.2d 466 (10th Cir. 1979), *cert. den.* 449 U.S. 901 (1980), or because statutory restrictions were validly removed on application of the Indian, *Dillon v. Antler Land Co. of Wyola*, 507 F.2d 940 (9th Cir. 1974), *cert. den.* 421 U.S. 992 (1975), or because Congress itself had terminated the trust status of the lands. *Dennison v. Topeka Chambers Indus. Dev. Corp.*, 724 F.2d 869 (10th Cir. 1984), affirming 527 F. Supp. 611 (D.Ks. 1981).



tations will not bar an express trust such as they allege here is unpersuasive. The facts do not show the existence of an express trust."), *Menominee Tribe of Indians v. U.S.*, 726 F.2d 718, 722 (Fed. Cir. 1984), *cert. den.* 105 S. Ct. 106 (1985) (" 'the statute of limitations applies to Indians the same as to anyone else' (except, perhaps, in the presence of an *express* trust . . . .)" quoting from *Fort Mohave*). Plainly, the General Allotment Act and the "trust patents" constitute an express trust with respect to alienation of allotted lands. *Cf., United States v. Mitchell*, 445 U.S. 535, 543-44 (1980).[28] *See generally, Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1249-50 (N.D. Cal. 1973), cited with approval in *United States v. Mitchell*, 463 U.S. 206, 226 n. 31 (1983).

Thus, the *applicability* of statutes of limitation requires an inquiry into whether the lands at suit are "restricted property" or whether restrictions had been removed in accordance with acts of Congress. This necessitates preliminary consideration of the merits of the allottee's claim, because, if the actions of the executive officers with respect to Mottaz' allotment violated the statute, they are absolutely void, *see, Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922), *Hampton v. Ewert*, 22 F.2d 81, 92 (8th Cir. 1927), *cert. den.* 276 U.S. 623 (1928), *Begay v. Albers*, 721 F.2d 1274, 1281 (10th Cir. 1983), and because, if the conveyance was made without the consent of the allottee, it is

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[28]Where the beneficiary is in possession, statutes of limitations will not apply. Bogert, *The Law of Trusts and Trustees*, § 951 at 557-58 (2d ed. 1982). Here, possession of Mrs. Mottaz' allotment by the trustee should be considered possession by the beneficiary. *Nemkov v. O'Hare Chicago Corp.*, 592 F.2d 351, 356 n. 6 (7th Cir. 1979), citing *Lewis v. Hawkins*, 90 U.S. (23 Wall.) 119 (1875), as the location of Respondent's allotment in a national forest is not inconsistent with Congressional policy. *See*, 25 U.S.C. § 337.

void and wholly ineffective to terminate the trust status of the land. *Mott v. United States,* 283 U.S. 747, 751-52 (1931), *Board of Com'rs v. United States,* 100 F.2d 929, 933 (10th Cir. 1938), *mod. on other grds* 308 U.S. 343 (1939), *Begay v. Albers,* 721 F.2d 1274, 1278-80 (10th Cir. 1983). Were the rule otherwise, unauthorized government employees (including persons employed in the Department of Interior) could cause the national interest[29] to be compromised through their actions and through the mere passage of time, in derogation of the plenary authority of Congress in this area. *See, United States v. California,* 332 U.S. 19, at 27 and 39-40 (1947).

In sum, and assuming that Respondent Mottaz seeks to protect the beneficial ownership and possessory interests in her trust property,[30] it was appropriate for the Court of Appeals to require on remand that the district court determine if the purported conveyance violated applicable law and whether Respondent Mottaz consented to the sale. *See, Mottaz v. United States,* 753 F.2d 71, 75 (8th Cir. 1985). As the Court of Appeals indicated, *ibid.*,

[29]*Heckman v. United States,* 224 U.S. 413, 437 (1912), *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 369-70 (1968).

[30]The Navajo Tribe agrees with the United States that proof that the purported conveyance of Respondent's allotment was in excess of statutory authority would be inconsistent with recovery for a taking. *See,* Brief of the United States, at 26, n. 14. The litigation strategy of particular litigants, perhaps dictated by attorney fee considerations, should not be allowed to distort settled law regarding either individual Indian trust property or the law of what constitutes a compensable taking. Only Congress can authorize a taking of Indian lands. *See, U.S. v. Santa Fe Pac. R. Co.,* 314 U.S. 339 (1941). Much of the law concerning 25 U.S.C. § 345, it appears, has been decided on less than ideal pleadings. *See, Loring v. United States,* 610 F.2d 649 (9th Cir. 1979) (no jurisdictional allegation at all; court supplies § 345 as jurisdictional basis), *Mottaz v. United States,* 753 F.2d 71, 75 (8th Cir. 1985) (Mottaz' complaint "not particularly well-drafted;" court construes prayer for relief generously).



resolution of these questions will determine whether the land remains in trust. If the restrictions were validly removed in 1955, the statute will have run, and Mottaz "does not have a cause of action." *Ibid.* The remand, therefore is entirely consistent with federal law.[31]

### C. Congress Has Not Enacted Any Statute Of Limitations Which May Be Applied In Actions To Protect Possessory Interests In Trust Allotments.

The Congress, the courts, and, indeed, the Solicitor for the Department of the Interior all agree that there is no statute of limitations applicable in actions involving possessory rights to trust lands. That Congress, except in one instance noted below, has not seen fit to impose time bars on Indian allottees seeking to protect possessory rights to trust land is probably explained by then-Attorney General Harlan F. Stone as resulting from "[t]he doctrine of fostering guardianship by a paternal government of its recognized wards and the disinclination to involve technical rules of law to the prejudice of Indian tribes or members thereof."[32]

[31]The Tenth Circuit, in *Begay v. Albers,* 721 F.2d 1274 (1983), in an action under 25 U.S.C. § 345 regarding forged deeds, has employed a similar analysis as the Eighth Circuit. The Ninth Circuit also appears to recognize the correctness of the *Mottaz* approach in actions where there are non-frivolous allegations that a conveyance of trust land is void. *Big Spring v. U.S. Bureau of Indian Affairs,* 767 F.2d 614, 616-17 n. 1 (1985).

[32]*Five Civilized Tribes of Indians—Income Tax Refund—Statute of Limitations,* 34 Op. A.g. 302, 304 (1924). Justice Stone's position, that general statutes of limitations should not bar claims for tax refunds by individual Indians who relied on the erroneous advice and actions of federal officials, has been adopted by the courts. *See, e.g., Dodge v. United States,* 362 F.2d 810, 813 (Ct. Cl. 1966), *Daney v. United States,* 247 F. Supp. 533, 535 (D.Ks. 1965), *aff'd* 370 F.2d 791 (10th Cir. 1966), *Nash v. Wiseman,* 227 F. Supp. 552 (W.D. Okla. 1963), *Clark v. United States,* 587 F.2d 465 (10th Cir. 1978).

This Court, in *County of Oneida v. Oneida Indian Nation,* — U.S. —, 105 S. Ct. 1245 (1985), recently analyzed the assertion that statutes of limitations barred a claim for tribal lands. The Court first held that "[t]here is no federal statute of limitations governing federal common law actions by Indians to enforce property rights." *Id.,* S. Ct. at 1255.[33] The Court further held that "the borrowing of a state limitations period in these cases would be inconsistent with federal policy." *Ibid.* The Court discerned the federal policy from the Trade and Intercourse Act of 1793, from a 1950 act of Congress (and its legislative history),[34] and from recent indications of Congress found in the enactment and successive extensions of a statute of limitations for ancient Indian trespasses. 28 U.S.C. § 2415.

The *Oneida* analysis, embraced by all of the Justices, compels the conclusion that federal statutes of limitations are also inapplicable to actions seeking to protect rights of possession and beneficial ownership in trust allotments. Much as the Nonintercourse Act has formed the foundation of the government's policy regarding alienation of tribal lands, the restrictions on alienation in the General Allotment Act have been the cornerstone of Congressional policy with respect to allotments, as this Court has repeatedly recognized.

Furthermore, in 1902 Congress plainly indicated that the rights created in § 345 were subject to no limitations period. Soon after the enactment of what is now 25

[33]The dissent agreed: "Of course, as the Court notes, there 'is no federal statute of limitations governing federal common law actions by Indians to enforce property rights.'" *Id.,* S. Ct. at 1263.

[34]*See, id.,* at 1255 and n. 14, discussing 25 U.S.C. § 233 and its legislative history.



U.S.C. § 345, heirs of Shawnee Indians who had sold restricted lands by deeds duly approved by the Secretary of the Interior more than thirty years previously had filed suits in ejectment against the conveyees, who had possessed the lands for many years and had constructed valuable improvement thereon.[35] A bill was introduced "to prevent this species of blackmail without in any way interfering with or preventing any legitimate and just claim."[36] The bill, as amended,[37] became law on May 31, 1902, and is codified at 25 U.S.C. § 347. Section 347, made the limitations period established by state law applicable in actions for land "patented in severalty . . . under any treaty . . . where a deed has been approved by the Secretary of the Interior."[38] Congress has passed no similar legislation with respect to other lands which may be claimed by Indian allottees.

The absence of a federal statute of limitations applicable in actions by Indians to protect rights to trust property is underscored by 28 U.S.C. § 2415. The legislative history of § 2415 shows, first, that actions brought to establish title to lands were not to be barred by § 2415, and second, that Congress neither believed nor intended that such actions were barred by *any* federal statute of limitations. *See, County of Oneida v. Oneida Indian Nation,* 105 S. Ct. 1245, 1255 (1985):

[35]*See,* H.R. Rep. No. 1732, 57th Cong., 1st Sess. (1902).

[36]S. Rep. No. 800, 57th Cong., 1st Sess. (1902).

[37]The bill initially introduced only concerned lands patented to Shawnee Indians under an 1854 treaty, but was amended by the House to include lands patented in severalty under any treaty. 35 Cong. Rec. 5748 (May 21, 1902).

[38]Even under 25 U.S.C. § 347, the limitations period does not begin to run until restrictions on alienation are validly removed. *Baldridge v. Caulk,* 110 Okla. 185, 237 P. 453 (1925), *McLish v. White,* 97 Okla. 150, 223 P. 348 (1924).

> The legislative history of the 1972, 1977, and 1980 amendments demonstrates that Congress did not intend § 2415 to apply to suits brought by the Indians themselves, and that it assumed that the Indians' right to sue was not otherwise subject to any statute of limitations. Both proponents and opponents of the amendments shared these views.[39]

Thus, Congress preserved all Indian actions "to establish the title to, or right to possession of, real or personal property." 28 U.S.C. § 2415(c).

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[39]In addition to the legislative history cited in *Oneida* at 1255-56, *see, e.g.*, S. Rep. No. 96-569, 96th Cong., 2d Sess. 4 ("The statute of limitations does not bar an . . . individual Indian . . . from bringing a claim for title to lands"); S. Rep. No. 92-1253, 92d Cong., 2d Sess. 3 ("In other words claims against the United States would not be affected by this legislation."); H.R. Rep. No. 92-1267, at 4 and 7 (same); 118 Cong. Rec. 23966 (1972) (remarks of Senator Jackson, incorporating a Wall Street Journal article: "the expiration next week wouldn't affect Indian claims against the federal government to establish land title . . . ."). With respect to the recognition of the trust duty of the United States with respect to such actions to protect interests in trust allotments, *see, e.g.*, S. Rep. No. 96-569, 96th Cong., 2d Sess. 9 ("A great majority of the thousands of Indian claimants are heirs of deceased allotees or trust patentees. * * * The United States, of course, has a responsibility to them just as it does to recognized tribes, bands or groups."); 123 Cong. Rec. 22512 (1977) (remarks of Mr. Udall):

> I understand that some thought has been given to expanding the scope of the statute to include Indian title to land and to reducing the extension of time.
>
> Mr. Chairman, there is no statute of limitations on claims of the United States based upon its title to lands . . . . While Indian lands are not Federal lands, the fee title to those lands is held by the United States in trust for the Indians. If there is no statute of limitations with respect to lands held by the United States for itself, there should be no statute with respect to lands which it holds in trust for the Indians.

*See also*, 123 Cong. Rec. 17498 (1977) (remarks of Mr. Danielson); 123 Cong. Rec. 17500 (1977) (remarks of Mr. Foley); 123 Cong. Rec. 22165-66 (1977) (remarks of Mr. Danielson); 123 Cong. Rec. 22503 and 22511 (1977) (remarks of Mr. Cohen).



In considering the effect of 28 U.S.C. § 2415(c), the Solicitor—consistent with the Department's position in its 1958 and 1966 editions of *Federal Indian Law*—opined that:

> If individual Indians or a tribe were to institute litigation, they would be subject to the statute of limitations applicable to the general public *except with respect to actions to quiet the title to trust or restricted lands (if the statute were permitted to run in such cases it would conflict with federal statute prohibiting alienation of Indian lands).*

*Effect of 28 U.S.C. §§ 2415, etc.*, 80 I.D. 220, 221-22 (1972) (emphasis added).

Before the *Oneida* decision, the lower courts had held that statutes of limitations could not bar an Indian's claim for possession or beneficial ownership of trust property. *See, e.g., Confederated Salish and Kootenai Tribes v. Namen*, 380 F. Supp. 452 (D. Mont. 1974) *aff'd* 534 F.2d 1376 (9th Cir. 1976), *cert. den.* 429 U.S. 929 (1976), where the court held in favor of successors-in-interest of Indian allottees who asserted that the trust patents conveyed certain riparian rights. In applying federal common law, the court noted:

> It is of course clear that there is no statute of limitations, and the doctrine of laches is not applicable.

*Id.*, 380 F. Supp. at 466 n. 25. *See also, Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780, 784-85 (D. Conn. 1976), *Narragansett Tribe, etc. v. So. R.I. Land Devel.*, 418 F. Supp. 798. 804-806 (D.R.I. 1976).

Despite the language and reasoning of *Oneida*, and despite the consistent view of the courts, the Congress and the Department of the Interior that actions brought by allottees to protect property rights in trust property are

not to be barred by laches[40] or any statute of limitation, the Brief for the United States asserts that 28 U.S.C. § 2409a(f), the 12-year statute of limitations in the Quiet Title Act, bars Respondent's action. The Quiet Title Act has no bearing on allottee claims to protect interests in trust property, however.

First, the United States will retain fee title to Respondent's allotment in any event.[41] More important, of course, is that Congress specifically excepted Indian lands from the coverage of the Quiet Title Act. Congress could not have been clearer: "This section does not apply to trust or restricted Indian lands . . . ." 28 U.S.C. § 2409a(a); *Block v. North Dakota*, 461 U.S. 273, 283 (1983). The reason for this exception is stated in the House and Senate Reports:

> The federal government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his administration against abridging the historic relationship between the Federal Government and the Indian without the consent of the Indians.

H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. 13; S. Rep. No. 92-575, 92d Cong., 1st Sess. 4.

It cannot be seriously argued that the 92d Congress—cognizant of the trust relationship, the commitments to the Indians made in various agreements,[42] and the historic federal-Indian relationship—when it said that the Quiet Title Act "does not apply to trust or restricted Indian lands" really meant that the Quiet Title Act not only applies in actions where Indians themselves seek to protect property interests in trust lands, but also imposes a limitations period on such actions where none existed previously. Indeed, this same 92d Congress extended the limitations period for historic trespass claims by Indians, excepting all actions for land title from even the extended limitations period of 28 U.S.C. § 2415. The Justice Department's construction would violate the language of the Quiet Title Act, the intent of Congress, the canon of construction to construe statutes in favor of Indian wards, and the canon of construction to strictly observe conditions to legislation waiving sovereign immunity.[43] Moreover, this Court has been unwilling to construe acts of Congress to diminish Indian rights in such a backhanded fashion.[44]

The Justice Department stretches even further, positing that, if the 12-year limitations period of the Quiet Title Act doesn't apply, then the six-year period of 28 U.S.C.

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[40]Although laches is not an issue here, ALTA cites two cases, *Felix v. Patrick*, 145 U.S. 317 (1892), and *Lemieux v. United States*, 15 F.2d 518 (8th Cir. 1926), *cert. den.* 273 U.S. 749 (1927), regarding the applicability of the doctrine of laches in Indian cases. In *Felix v. Patrick*, the Indians had severed their tribal relations and no longer enjoyed the fiduciary relationship with the United States with respect to their land. *See, Schagticoke Tribe*, 423 F. Supp. at 785 n. 7. *Lemieux* presented a unique fact situation: the Indian plaintiff in *Lemieux* sought to dispossess another Indian to whom a trust patent had been issued. Failure to apply laches would have, therefore, *defeated* the Congressional policy to protect the rights of the Indian wards as would the application of laches in the usual § 345 action.

[41]*Cf., Block v. North Dakota*, 461 U.S. at 291-92. *See, Pueblo of Taos v. Andrus*, 475 F. Supp. 359 (D.D.C. 1979).



[42]Respondent's allotment was in the nature of such an agreement. *See, County of Thurston v. Andrus*, 586 F.2d 1212 (8th Cir. 1978), *cert. den.* 441 U.S. 952 (1979).

[43]*See, Block v. North Dakota*, 461 U.S. 273, 287 (1983).

[44]*See, e.g., Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968).

§ 2401(a) does. Thus, in the Justice Department's view, non-Indians to whom the United States owes no duty of trust have twelve years to bring actions for real property, but Indian wards are barred from asserting beneficial title to trust lands after only six years. Statutes should be construed to avoid such absurd results. *See, e.g., United States v. Brown,* 333 U.S. 18, 26-27 (1948).

The United States seems to rely on language in *Federal Power Com'n v. Tuscarora Indian Nation,* 362 U.S. 99 (1960), for the proposition that general statutes of limitations apply to, *inter alia,* actions by Indians to protect interests in trust land. See Brief of United States, at 27 and 48. *Tuscarora* was a case involving land *not* held in trust for Indians. As Cohen notes, the broad language in *Tuscarora*[45] is limited "to situations where no special Indian rights were at issue, unless Congress clearly intended to infringe such rights."[46] Thus, in *Squire v. Capoeman,* 351 U.S. 1 (1956), the Court ruled that the general federal income tax did not reach capital gains from sales of timber of allotted lands, in view of the language and purpose of the General Allotment Act. *See also, United States v. Winnebago Tribe,* 542 F.2d 1002 (8th Cir. 1976), *Donovan v. Navajo Forest Products Industries,* 692 F.2d 709, 713 (10th Cir. 1982). This Court, moreover, has previously taken into consideration the national interest in the protection of the possessory rights of Indians in rejecting the application of a general statute of limitations. *Cramer v. United States,* 261 U.S. 219, 233-34 (1923) (general statute of limitations for suits brought by United States to annul patents inapplicable when United States sues to annul patents to protect possessory rights of Indians).

[45]A general federal statute "in terms applying to all persons includes Indians and their property interests." *Tuscarora,* at 116.

[46]F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), at 285.



## CONCLUSION

Assuming that Respondent Mottaz' complaint is properly characterized as one seeking to protect her beneficial interests in trust property, no statute of limitations is applicable to bar the cause of action. If, however, Respondent asserts that there has been a compensable taking, her action is barred, because—in order for a taking of a trust allotment to have occurred—the actions of the executive branch must have been within their statutory authority, necessarily entailing voluntariness (and, thus, knowledge) on the part of Respondent at the time of the conveyance.

Not every case purportedly brought under 25 U.S.C. § 345 involves an Indian's attempt to protect interests in trust property. Actions have been brought under § 345 for rights-of-way on BLM lands and for money damages to redress takings. For those causes of action against the United States which in fact seek to protect interests in or appurtenant to trust property, however, it is clear that Congress has not imposed a time period within which such claims must be prosecuted.

Respectfully submitted,

PAUL E. FRYE
Counsel of Record
200 Lomas Blvd., N.W.
Suite 815
Albuquerque, NM 87102
(505) 247-9592

Dated: February 10, 1986

(9)

No. 85-546

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

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UNITED STATES OF AMERICA,

Petitioner,

v.

FLORENCE BLACKETTER MOTTAZ
on behalf of herself and all
others similarly situated,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
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# BRIEF OF KATHERINE NICHOLS, CLOVER POTTER, GLADYS ECOFFEY AND ROSEMOND GOINS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Kim Jerome Gottschalk
Counsel of Record
Native American
Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Dated: February 13, 1986

43 pp

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Kim Jerome Gottschalk
Counsel of Record
Native American
Rights Fund
1506 Broadway
Boulder, CO 80302
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## QUESTIONS PRESENTED

1. Whether 25 U.S.C. §§ 345-346 Provide Jurisdiction Over An Action To Recover Indian Trust Allotments Illegally Transferred By The Secretary Of The Interior To The United States Forest Service?

2. Whether There Is Any Federal Statute Of Limitations Which Bars An Action Under 25 U.S.C. §§ 345-346 To Recover Trust Allotments Illegally Transferred By The Secretary Of The Interior To The United States Forest Service?

## INTEREST OF THE AMICI CURIAE

Amici are heirs of allottees seeking to recover possession of allotted trust lands from third parties who acquired possession because of the federal policy of forcing fee patents on Indian allottees prior to the expiration of the trust period in violation of the Burke Act, 34 Stat. 182, 25 U.S.C. § 349. Certain aspects of amici's claims rely on 25 U.S.C. §§ 345-346 and the need to avoid the time bar contained in 28 U.S.C. § 2401(a). Therefore, amici are interested in the outcome of the present case. The Native American Rights Fund, attorney for amici, herein, is a national Indian legal organization with a general interest in these questions.

Both Petitioner and Respondent consent to the filing of this brief.



## SUMMARY OF ARGUMENT

The language and underlying policy behind 25 U.S.C. §§ 345-346 indicate that the jurisdictional grant is not limited to actions to compel the issuance of allotments in the first instance. Rather, jurisdiction extends to actions to recover allotments illegally lost. This interpretation is implicitly supported by decisions of this Court. See e.g., McKay v. Kalyton, 204 U.S. 458 (1907) and is directly supported by numerous Courts of Appeals' decisions. See e.g., Gerard v. United States 167 F.2d 951 (9th Cir. 1948); Fontenelle v. Omaha Tribe, 430 F.2d 143 (8th Cir. 1970).

The Quiet Title Act, 28 U.S.C. § 2409a did not repeal 25 U.S.C. §§

345-346 and therefore the statute of limitations contained in 28 U.S.C. § 2409a(f) is inapplicable.

The statute of limitations contained in 28 U.S.C. § 2401(a) is inapplicable to actions to recover allotments under 25 U.S.C. §§ 345-346. Since the land is still held in trust, the statute never starts running. Lewis v. Hawkins, 90 U.S. (23 Wall) 119 (1875). In addition, § 2401(a) came about as a result of the 1948 codification of federal law. It derived from a provision that did not apply to §§ 345-346. There was no congressional intent to extend its applicability in the 1948 codification.



## ARGUMENT

### I. FEDERAL DISTRICT COURT JURISDICTION UNDER 25 U.S.C. §§ 345-346 INCLUDES OWNERSHIP CLAIMS TO PREEXISTING ALLOTMENTS

25 U.S.C. §§ 345-346 confer jurisdiction on district courts to adjudicate the right of any Indian to an allotment of land, and the statute waives the immunity of the United States to suit. If Mottaz's claims in this case are construed as allotment ownership claims,[1/] this statute confers jurisdiction to decide whether the trust title of the United States

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1/Mottaz's claim was construed by the Court of Appeals to be an ownership claim to allotted land. Amici take no position on the question of how to read her claim. Our brief addresses the issues presented as if the Court decides to treat her claim as one to assert ownership of Indian allotments.

was lawfully removed from her allotments. The government argues the contrary on the theory that the statute applies only to assert rights to new allotments, its so-called "original allotment" theory. Gov. Br., pp. 33-47. If the Court reaches this issue, the government's interpretation should be rejected.

The government's case on this question sounds better than it is because the government's brief gives a distorted history of the statute. The brief quotes from judicial opinions in which the quoted language was dictum without disclosing this, and it fails to acknowledge the weight of contrary precedent. In fact, every reported



judicial holding on point is contrary to the government's position.[2/]

### A. The Purpose Of 25 U.S.C. §§ 345-346 Is To Provide Indian Allotment Owners With A Judicial Forum For Ownership Claims Arising During The Trust Period

The central words of the statute that define its scope are "any action, suit, or proceeding in relation to their right thereto" and "any action, suit, or proceeding . . . involving

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2/This is not to say that the Congresses of 1894 and 1901, which gave us the statute, expected it to last until 1986. Their understanding was that allotments would last but 25 years and that both allotments and Indian reservations would then disappear. See, e.g., Solem v. Bartlett, 104 S.Ct. 1161, 1165 (1984) ("Consistent with prevailing wisdom, members of Congress voting on the surplus land acts believed to a man that within a short time--within a generation at most--the . . . reservation system would cease to exist.") But Congress did contemplate that the statute would be available to Indians as long as the trust period continued.

the right . . . to any allotment." These are comprehensive words that take in any claim of right to an allotment, new or preexisting. That the statute's operation ends when the trust period ends may be inferred from the provisions requiring service on the United States as trustee.

This reading is confirmed by judicial opinions written soon after enactment. One of the first courts to construe the statute stated, "under the act of August 15, 1894 (28 Stat. 385), the jurisdiction, in cases coming within the purview of the act, may be exercised while the title remains in the United States" (emphasis added). Sloan v. United States, 95 F. 193, 195 (C.C.D. Neb. 1899) (Shiras, J.), appeal dismissed,



193 U.S. 614 (1904). In McKay v. Kalyton, 204 U.S. 458, 468-69 (1907), this Court elaborated:

> [P]rior to the act of Congress of 1894 controversies necessarily involving a determination of the title and incidentally of the right to the possession of Indian allotments while the same were held in trust by the United States were not primarily cognizable by any court, either state or Federal . . .
>
> "By [the act of 1894] the United States consented to submit its interest in the trust estate and the future control of its conduct concerning the same to the result of the decree of the courts of the United States, a power which such courts could alone exercise by virtue of the consent given by the act . . . . Nothing could more clearly demonstrate, than does this requirement, the conception of Congress that the United States continued as trustee to

> have an active interest in the proper disposition of allotted Indian lands and the necessity of its being made a party to controversies concerning the same. . . "

We have underlined parts of the quoted words to call attention to those most pertinent to this case--words that indicate this Court's view that the scope of the statute is coextensive with the federal trust and includes "future control" of allotted land and its "proper disposition." While the McKay case is not a holding on the issue before this Court, it is this Court's most comprehensive prior description of the statute, and it did involve a controversy over an allotment previously made.3/

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3/McKay involved a dispute between allotment heirs, and this

(footnote continued on next page)



We do not suggest that §§ 345-346 extend to any lawsuit with some logical relationship to an allotment. The statute depends on a claim of right to allotted land. On occasion, litigants have attempted to invoke the statute not to test questions of their ownership rights to allotments but to challenge federal Indian policy. The courts have denied jurisdiction over these claims. As this Court said in Arenas v. United States, 322 U.S. 419, 432 (1944), the courts must "separate questions of right from questions of

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3/(continued) particular subject was expressly removed by later legislation. See discussion, infra, at pp. 26-27. But that change does not affect the relevance of the Court's description of the act of 1894.

policy." In the course of carrying out this Court's mandate in that case, the lower federal courts adjudicated many questions of right beyond the original right to an allotment, including disputes between allottees, allocation of appurtenant water rights, and recovery of accumulated rents and profits. The government's original allotment theory was expressly rejected. United States v. Pierce, 235 F.2d 885 (9th Cir. 1956); Segundo v. United States, 123 F. Supp. 554 (S.D. Cal. 1954), appeal dismissed, 221 F.2d 296 (9th Cir. 1955). But the lower courts refused to allow the adjudication of claims beyond questions of allotment ownership rights. E.g., United States v. Preston, 352 F.2d 352 (9th Cir.



1965) (no jurisdiction under 25 U.S.C. §§ 345-346 over action by non-Indian lawyer for Indian allottees seeking to collect legal fees).

### B. The Government's Theory Limiting The Statute To Original Allotments Will Not Withstand Analysis

Just what is the government's theory? At first, one would think that the government seeks to limit the statute to suits by Indians against the government to compel the making of an original allotment. But this cannot be correct. The statute's words say that Indians may "prosecute or defend any action, suit, or proceeding in relation to their right" to an allotment (emphasis added). This version of the government's theory is inconsistent with the words "or defend," which contemplate a

contest between Indians to an allotment, previously made.

Moreover, the statute specifies that it covers claims "to an allotment . . . or . . . to have been unlawfully denied or excluded from any allotment." The disjunctive words belie the government's theory. One cannot be "excluded from" an allotment that has not yet been made. If a drafter sought to create a statute to allow only suits to compel the making of new allotments, the statute would stop with the word "denied." This version of the government's theory violates the basic rule of statutory construction that courts ought to give meaning to all words of a statute, to render none redundant.



Also, a reading of the statute limited to compelling the making of original allotments would be contrary to clear precedent in this Court. Most of the early reported decisions involved cases in which an allotment had been made to one Indian, and another Indian sued to claim a better right to that allotment. One of these was Hy-yu-tse-mil-kin v. Smith, 194 U.S. 401 (1904), in which jurisdiction was confirmed at pp. 407-09. In another case, the government argued in favor of this limited reading of the statute and lost. United States v. Fairbanks, 171 F. 337 (8th Cir. 1909), aff'd, 223 U.S. 215 (1912)

Possibly the government has a somewhat different theory in mind. Possibly it would allow lawsuits over

allotments previously granted if the contest challenges the initial granting of the allotment but not if it challenges something that occurred even one day later. If so, this theory tidies up the government's problem with the statutory words "or defend" and "or excluded from." But it depends on an even more strained implication from the statutory words. The government's version now would not be that the statute is limited to test whether an Indian has a right to get an original allotment from the government. Instead, it extends to challenges against an Indian previously allotted filed by another Indian claiming a better title to that existing allotment. But, according to this theory, the basis for the better



title claim must antedate the making of the allotment; if that claim depends on an event occurring one day after the allotment was made to the first allottee, there would be no jurisdiction. Illegal acts by government agents may be sued upon if they occur up to and including the day the allotment is made, but illegal acts after that would be immune from suit.

This reading simply does not accord with a purposeful reading of the statute. As this Court noted in McKay v. Kalyton, supra, a basic purpose of Congress was to involve the United States as trustee in lawsuits respecting allotments "during the period in which the land was to be held in trust." 204 U.S. at 468.

From the point of view of an Indian allottee or would-be allottee, the federal trust poses several problems. The Interior Department retains extensive control over the allotment during the trust. See Felix S. Cohen's Handbook of Federal Indian Law 618-27 (1982 ed.). In some cases, the alleged wrongdoer is a federal agent. In all cases, the United States is fee title holder. The statute's purpose is to provide jurisdiction to overcome these problems. See F. Cohen, Handbook of Federal Indian Law 381 (1941). Congress could have given this jurisdiction to state courts (as in fact it was for some Oklahoma tribes, see 1982 Cohen, supra, at 787-88, but Congress chose federal courts. In any case, the logical



scope of the statute in light of its purpose is the period of federal trust, when the title is in the United States. Cf. United States v. Rickert, 188 U.S. 432 (1903). The statute is part and parcel of the congressional scheme of the General Allotment Act, 25 U.S.C.§§ 331 et seq. to protect and defend the Indians' beneficial ownership of their allotments, a purpose this Court has defended against the actions of the federal government. See Squire v. Capoeman, 351 U.S. 1, 9 (1956). See also United States v. Mitchell (I), 445 U.S. 535 (1980).

The government also relies on the wording in §§ 345-346 that provides that the judgment or decree in any 345-346 case shall be certified to the

Secretary "as if such allotment had been allowed and approved by him." Gov. Br., p. 35. But this language does not supply the limitation to new allotments that the government advocates. Any Indian who has prevailed in court on his or her right to any allotment, whether a new or existing one, needs to have the title recognized by the Secretary because of the management duties and control that the Secretary exercises over allotted land--control that was much greater at the time the statute was enacted--and because legal title to allotted land is in the United States. 25 U.S.C. §§ 345-346 contemplates cases in which the government, though named and served, chooses not to appear. The section specifies that the action may



go forward without the government. On each of these points, see the Court's discussion in McKay v. Kalyton, supra, 204 U.S. at 467-69.

### C. The Legislative History Does Not Support The Government's Theory

The government asserts that legislative history supplies its "original allotment" theory with the support that the words do not. Gov. Br., pp. 36-40. A basic problem with the government's readings from legislative history is that the statute plainly includes suits to obtain an original allotment, and when it was first enacted in 1894, many early cases under the statute were likely to be of this sort. Thus, any suggestion from the legislative history that this kind of suit was to

be permitted is correct but proves nothing respecting the issue at bar.

Nothing the government cites, nor any reference known to us, says that only claims to new allotments are allowed and claims to existing allotments are excluded. In each case, the government's argument depends on two steps: construing words such as "claims to allotments" to mean, by implication, only claims to new allotments, then construing the words by negative implication to exclude claims to existing allotments. In context, none of the references can be said with any confidence to mean what the government argues. In each case, the purpose of the language quoted was quite remote from the issue before this Court.



There is no evidence that Congress or particular members intended to describe the scope of the statute.

Much of the legislative history cited is not history of the statute itself but of later special exclusions from it of particular tribes in eastern Oklahoma. In these instances, the focus of Congress was on the reasons for the exclusions, not on the scope of the statute itself.

### D. 28 U.S.C. § 1353 Has The Same Scope As 25 U.S.C. §§ 345-346

The allotment jurisdiction statute that appears in the judicial code, 28 U.S.C. § 1353, does not include all of the words discussed above. Standing alone, it might be a more ambiguous statute. (It also omits the express limitation in 25 U.S.C. § 345-346 to Indian plaintiffs only.) But § 1353

did not amend 25 U.S.C. §§ 345-346.[4/] Codifications of this sort are normally construed not to repeal or modify the statutes organized by the codification unless the contrary intent clearly appears. This rule is expressed in the wording of the 1911 judicial code, which created what is now § 1353. Act of March 3, 1911, ch. 231, § 294, 36 Stat. 1087, 1167 ("unless such change of intent shall be clearly manifest.")

Moreover, the general codifications of 1925-1926, 1940, and 1948 each carried forward 25 U.S.C. §§ 345-346 as still in force, and this Court and lower federal courts have continued to treat the earlier law as

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4/The government inferentially suggests the contrary at Gov. Br., p. 38.



remaining in force and to treat its language as controlling. See the cases cited infra under E. and F. A good example is Seifert v. Udall, 280 F. Supp. 443 (D. Mont. 1968), in which a non-Indian plaintiff tried to rely on § 1353, which is not expressly limited to Indian plaintiffs. The court declined jurisdiction based on the express words of 25 U.S.C. §§ 345-346. See also, 1982 Cohen, supra, at 313-14 n.265.

### E. Decisions Of This Court Construing 25 U.S.C. §§ 345-346 Do Not Support The Government's Theory

We have already discussed McKay v. Kalyton, supra, which we believe to be this Court's most pertinent examination of the statute. See also Hy-yu-tse-mil-kin v. Smith, supra. The government relies on dicta in other opinions that are more remote from the issue here.

The government's brief relies very heavily on the Court's opinion in First Moon v. White Tail, 270 U.S. 243, 245 (1926), but it never explains the holding in the case. Gov. Br., pp. 39, 40-41. An Indian sought judicial review of an heirship dispute with another Indian over an allotment in the teeth of the express language of 25 U.S.C. § 372, which commits heirship determinations to the exclusive jurisdiction of the Secretary. The Court quite properly upheld the exclusive jurisdiction conferred by the heirship law. The scope of 25 U.S.C. §§ 345-346 was irrelevant to this issue, and the decision is clearly correct on either view of the question now before this Court.

The language quoted by the government was inserted in the course



of rejecting a weak argument of plaintiff's counsel. All parties recognized that prior to the enactment of the heirship statute in 1910, the federal courts had exercised jurisdiction over heirship disputes between Indians claiming allotments. The very purpose of the 1910 act was to take away that jurisdiction and commit it to the Secretary exclusively. The First Moon plaintiff argued that the 1911 judicial code enactment of what is now 28 U.S.C. § 1353 had restored the jurisdiction that the 1910 heirship statute had taken away. Since there is no indication that Congress so intended, and codifications are not to be read to alter the substantive scope of the laws they include, this was clearly a correct decision. See Hallowell v. Commons, 239 U.S. 506 (1916); 1982

Cohen, supra, at 314. But it does not support the government here.

In fact, the pre-1910 practice of adjudicating allotment heirship disputes shows the error of the government's theory. These were a class of allotment cases that did not involve original allotment rights but that were heard by the federal courts pursuant to what is now 25 U.S.C. §§ 345-346 prior to 1910. An example of such jurisdiction in a reported case is Patawa v. United States, 132 F. 893 (C.C.D. Ore. 1904), sustaining jurisdiction over a dispute between an allottee's heir and the allottee's widow claiming a dower right in the allotment.

Moreover, since 1910, at least one federal court has sustained 345-346 jurisdiction to decide a constitutional challenge to an heirship



determination, and this Court affirmed. Simmons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965), aff'd mem., 384 U.S. 209 (1966). In several other decisions, this Court has cited the statute in circumstances that imply its availability in instances other than suits for original allotments. Minnesota v. United States, 305 U.S. 382, 389 n.5 (1939) (condemnation of allotted land); Heckman v. United States, 224 U.S. 413, 441-42 (1912) (recovery of allotments wrongfully sold at state tax sales.)[5/]

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[5/]Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), relied on by the government, (Gov. Br., pp. 35, 41), is not to the contrary. The Court there held that the land in question was not allotted land and thus not within the scope of 25 U.S.C. §§ 345-346. See 1982 Cohen, supra, at 314.

## F. Lower Federal Court Decisions On Point All Reject The Government's Theory

In numerous decisions, the Courts of Appeals for the Eighth, Ninth, and Tenth Circuits have sustained jurisdiction over actions by Indians to protect or defend the ownership rights in trust allotments other than actions to obtain a new allotment. E.g., Christensen v. United States, 755 F.2d 705 (9th Cir. 1985) cert. pet. pending, No. 85-372; Begay v. Albers, 721 F.2d 1274 (10th Cir. 1983); Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (8th Cir. 1970); United States v. Pierce, supra; Gerard v. United States, 167 F.2d 951 (9th Cir. 1948).

The government's brief acknowledges these decisions in a footnote but then attempts to impugn



them by asserting that two of the circuits followed the government's theory. Gov. Br., pp. 42-43 n.22. This contention is not correct. These courts had earlier rejected jurisdiction over claims that were not claims of right to Indian allotments. Some were attacks on federal Indian policy, others were actions for money damages. See Vincenti v. United States, 470 F.2d 845 (10th Cir. 1972), cert. dismissed, 414 U.S. 1057; Harkins v. United States, 375 F.2d 239 (10th Cir. 1967); United States v. Preston, supra; United States v. Eastman, 118 F.2d 421 (9th Cir. 1941). All were properly dismissed. See 1982 Cohen, supra, at 314 n.269. There is mention of the government's theory in the opinions, but only as

dictum.[6/] When these courts were confronted with the issue of §§ 345-346 jurisdiction in cases that did involve allotment ownership rights, each of them sustained jurisdiction.

One of the lower court cases is worthy of note because it shows the distinction between the cases that the government wins and those that it loses. In Scholder v. United States,

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6/How these dicta came about can be readily surmised. In each case, the government made, inter alia, the same argument it has made to this Court on this point. In each case, the court concluded that the case did not lie within 345-346 because no claim of right to an allotment was alleged. Busy courts then uncritically accepted all the arguments of the winning side, including the new-allotment-only theory. But in other cases when the issue was squarely presented, each court took a more careful look and disagreed with the government.



428 F.2d 1123 (9th Cir.), cert. denied, 400 U.S. 942 (1970), Indian plaintiffs challenged the Secretary of the Interior's practice of spending Indian irrigation appropriations to benefit non-Indian landowners and the Secretary's imposition of liens on Indian allotments. The court denied §§ 345-346 jurisdiction over the former part of the case because it did not involve any issue of ownership rights in allotments. But the court sustained §§ 345-345 jurisdiction over the lien issue because that did involve ownership rights. The government's new-allotment-only theory was expressly rejected. Id. at 1125-27, 1129.

The government also claims the Seventh Circuit as its champion,

relying on Coleman v. United States Bureau of Indian Affairs, 715 F.2d 1156 (7th Cir. 1983). Gov. Br., p. 42 n.22. Again, the claim is incorrect. In Coleman, descendants of Creek Indians sued the government for money damages for breach of trust in the disposition of land of the Creek Nation. The suit was brought in Illinois, though the land was in Oklahoma. The court first noted that the plaintiffs did not claim ownership rights in allotted land. "What appellants seek is money damages for alleged breach of trust in the management of surplus, unallotted lands." Id. at 1162 (emphasis added). The court then speculated about a possible allotment claim that appellants might have brought. Even this hypothetical claim was rejected,



not on the government's theory, but because 345-346 do not apply to the Creek Tribe. Id. at 1162-64. This decision does not support the government here.

## II. THE QUIET TITLE ACT, 28 U.S.C. § 2409a DID NOT REPEAL 25 U.S.C. §§ 345-346

### A. Repeals By Implication Are Not Favored

The United States claims that the Quiet Title Act, 28 U.S.C. § 2409a (QTA) governs claims to ownership of an allotment in the possession of the United States action and that the twelve year statute of limitations contained in that Act therefore applies. 28 U.S.C. § 2409a(f). This amounts to an argument that the QTA repeals 25 U.S.C. §§ 345-346.

The QTA and 25 U.S.C. §§ 345-346 deal with different matters. The QTA was concerned that the general population of the United States be provided with an opportunity to sue the United States to resolve disputes to land in which the United States claimed an interest. 25 U.S.C. §§ 345-346 preceded the QTA by more than 75 years and was passed to provide protection to Indian allottees with whom the United States has an ongoing trust relationship. There is no indication that in passing the QTA, Congress meant to deprive allottees of preexisting remedies. "The intention to repeal must be clear and manifest." Morton v. Mancari, 417 U.S. 535, 551 (1974).



The principle against repeals by implication is more forceful where it is urged that a specific provision has been repealed by a later general provision. Busic v. United States, 446 U.S. 398 (1980); United States v. United Continental Tuna Corp., 425 U.S. 164 (1976). The QTA and §§ 345-346 are easily capable of coexistence; therefore the QTA did not repeal them.

### B. Congress Specifically Excepted Indian Trust Land From The QTA

The QTA waives the sovereign immunity of the United States from suit in actions "to adjudicate a disputed title to real property in which the United States claims an interest . . . ." 28 U.S.C. § 2409a(a). However, the waiver is specifically limited: "This section

does not apply to trust or restricted Indian lands . . . ." Id.[7] When Congress specifically conditions a waiver of sovereign immunity, the condition should be honored. Block v. North Dakota 461 U.S. 273, 287 (1983). Giving the exception for Indian trust lands its natural meaning here would serve to "[p]reserve the commitments the United States has made to the Indian people," (an identified motive of Congress in passing 28 U.S.C. § 2409a). Block v. North Dakota, supra, 461 U.S. at 283; Gov. Br., p. 24. If Congress did not want to submit Indian lands to potential loss in suits by other parties, there

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[7]In Grosz v. Andrus, 556 F.2d 972 (9th Cir. 1972) relied upon by the government, the court declined to rule on whether 28 U.S.C. § 2409a applied to a dispute over a right of way over trust land. 556 F.2d at 974.



is no reason to assume it would have intended the anomalous result of having possession of land lost to the trustee.[8]

## III. 28 U.S.C. § 2401(a) DOES NOT BAR ACTIONS FOR RECOVERY OF ALLOTMENTS UNDER 25 U.S.C. §§ 345-346

### A. So Long As The United States Holds The Land In Trust, 28 U.S.C. § 2401(a) Does Not Bar An Action Under 25 U.S.C. §§ 345-346 To Recover An Allotment

Both the United States and amicus curiae, American Land Title Association, take issue with the Court of Appeals' holding that ". . . if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee

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[8]28 U.S.C. § 2409a(f) would not itself effectuate a change in title even if it applied. Block v. North Dakota, 461 U.S. 273, 291-92 (1983).

simply retains title all along." Mottaz v. United States, 753 F.2d 71, 74 (8th Cir. 1985).[9] That holding is in line with prevailing authority that statutes of limitations do not run against the beneficiary, where there is a continuing trust. Lewis v. Hawkins, 90 U.S. (23 Wall) 119 (1875); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (N.D. Cal, 1973) (citing cases), Scott on Trusts, 3d ed. § 219.1, p. 1758 and f.n. 1. See also Daney v. United States, 247 F. Supp. 533 (D. Kan. 1965), aff'd, 370 F.2d 791 (10th Cir. 1966); Nash v. Wiseman, 227 F. Supp.

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9/In other words, the United States continues to hold the land under the express trust of the General Allotment Act, 25 U.S.C. §§ 331 et seq., and its extensions. See United States v. Mitchell (I), 445 U.S. 535 (1980).



552 (W.D. Okla. 1963); Dodge v. United States, 362 F.2d 810 (Ct.Cl. 1966), involving the inapplicability of federal tax statutes of limitation to income derived from trust property.

For present purposes, it is assumed that the Secretary acted beyond his authority in "selling" the land to the Forest Service.[10] The United States still holds the land in trust for the allottees' heirs. The statute of limitations does not run while the trust continues. Lewis v. Hawkins, supra. The present action

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10/The district court had dismissed on statute of limitations grounds. The Court of Appeals reversed and remanded for consideration of whether the transfer was void. Only if it was void would the bar of 28 U.S.C. § 2401(a) be avoided. Mottaz v. United States, 753 F.2d 71, 75 (8th Cir. 1985).

seeks to compel the United States to acknowledge its trust and is an action incidental to the trust.[11/] Such an incidental action is not subject to the statute of limitations while the trust continues. Manufacturers Trust Co. v. Kelly, 125 F.2d 650, 654 (2d Cir.), cert. denied, 316 U.S. 697 (1942) (action to compel restoration of trust res is part of the res itself and its assertion is merely an incident of the beneficiary's right to compel an accounting; therefore the statute of limitations does not run so

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11/Admittedly, Mottaz's theory of the case is not this clear, but this is the view most consistent with the theory of a void transfer.



long as the trust continues); Scott on Trusts, 3d ed., Vol III § 219.1, p. 1758. ("A beneficiary does not lose his interest in the trust property merely because of a lapse of time, however great . . . ." Id.) As stated previously, in the present posture of this case, it is assumed the trust continues. This situation must be contrasted with those where title to land protected by an express trust is not involved. See e.g., Capoeman v. United States, 440 F.2d 1002, 1007-1008 (Ct.Cl. 1971). Menominee Tribe of Indians v. United States, 726 F.2d 718, 722 (Fed. Cir. 1984), cert. denied, 105 S.Ct. 106 (1985).

In Ewert v. Bluejacket, 259 U.S. 129, 138 (1922) this Court refused to let laches or state statutes of limitation give validity to a void

deed so as to bar the rights of Indian wards in lands subject to statutory restrictions. The federal policy of protecting Indian lands also led this Court to refuse to borrow a state statute of limitations to defeat a claim to title in County of Oneida v. Oneida Indian Nation, 105 S.Ct. 1245 (1985). Federal policy militates against construing § 2401(a) to bar an action to recover an allotment where, as will be shown, there is no evidence Congress intended it to apply to actions under §§ 345-346.[12]

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[12]Also, the United States did not notify Mottaz of the possible existence of a claim until November 1981 (Gov. Br., p. 3) and her suit was filed the following month. It is highly unlikely that Congress, in ensuring that Indians would have one final chance to bring claims under 28 U.S.C. § 2415 (see County of Oneida v. Oneida Indian Nation, 105 S.Ct. 1245 (1985)) meant for such claims against the United States to be barred.



## B. The Legislative History Of 28 U.S.C. § 2401(a) Establishes That It Does Not Apply To Actions Concerning Indian Trust Allotments [13]

28 U.S.C. § 2401(a) states:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person

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[13]The argument to be made here has been rejected in certain circumstances as shown by the collection of lower court cases in the Gov. Br., p. 48. The question is one of first impression for this Court, however, and the clarity of the history will indicate the correctness of amici's view. Also, the Ninth Circuit Court of Appeals, while applying § 2401(a) to bar an action under §§ 345-346, specifically noted that the case before it did not involve a question of void title as does this case. Big Spring v. United States Bureau of Indian Affairs, 767 F.2d 614, 616-617 and n.1 (9th Cir. 1985).

> under legal disability or beyond the seas at the time the claims accrues may be commenced within three years after the disability ceases.

The statute which became § 2401(a) of the 1948 codification was part of § 41(20) of Title 28 in the 1940 Code, which in turn, can be traced to the 1911 codification. 36 Stat 1087 et seq. The 1911 provision (amended at 42 Stat. 311 (1921) to include provisions relating to recovery of taxes) provided that the district court would have original jurisdiction as follows:

> (20) Suits against United States.
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any



> regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, . . . and of all setoffs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court;
>
> . . .
>
> . . . No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. (Emphasis supplied).

36 Stat. 1093.

The statute of limitations was thus restricted to the causes of

action enumerated in the paragraph. The government's argument depends on the notion that the 1948 recodification of Title 28 intended to apply to actions for trust allotments, a limitation which had not previously applied.

The 1948 Revision of the Judicial Code separated the jurisdictional provision in paragraph 20 of 28 U.S.C. § 40, supra from the limitation period contained in the same paragraph. The jurisdictional provision became 28 U.S.C. § 1346(a) and the limitation period was moved to 28 U.S.C. § 2401(a). The Revisers' notes establish conclusively that there was no intention to make § 2401(a) applicable to actions to which it had not been previously applicable. The



Revisers' notes point out that § 2401 "[c]onsolidates the provision in section 41(20) of Title 28 U.S.C., 1940 ed., as to time limitation for bringing contract actions against the United States with section 942 [torts time limitation] of said Title 28." H. Rep. No. 308, 80th Cong. 1st Sess. p. A185 (1947); note also published at 28 U.S.C.A. § 2401. Thus, all that was being done was to combine the time limits for contracts and torts into one provision. There was no intent to apply a statute of limitations where it had not applied before.

Under the applicable rules of statutory construction, unless an intent to make changes is clearly expressed, no changes of law or policy

can be presumed from statutory revision. United States v. Ryder, 110 U.S. 729 (1884); McDonald v. Hovey, 110 U.S. 619 (1884). As the Court stated in Anderson v. Pacific Coast S.S. Co., 225 U.S. 187, 199 (1912):

> For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed. (Citations omitted).

In McDonald v. Hovey, this Court ruled on an issue very similar to the present case, namely whether a revised statute concerning limitations on actions was intended as an expansion of its previous meaning and construction. The Court held that a revision of a statute cannot enlarge or change its meaning unless Congress clearly indicates its intention to do so:



> So upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology--some change other than what may have been necessary to abbreviate the form of the law. Sedg. State. Const., 365. As said by the New York Court for the Correction of Errors, in Taylor v. Delancy, 2 Cai. Cas., 150: "Where the law antecedently to the revision was settled, either by clear expressions in the statute, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the Legislature to work a change." (Citations omitted.)

110 U.S. at 629.

These rules of construction are particularly applicable to the 1948 revision of the United States Code

which was an especially monumental undertaking. Application of those rules of construction was confirmed by the Chief Reviser of the Judicial Code, Title 28, in an article written shortly after the revision. Barron, The Judicial Code, 8 F.R.D. 439, 445-46 (1949):

> Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.
>
> Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.
>
> Congress recognized this rule by including in its reports the complete Reviser's Notes to each Section in which are noted all instances where change is intended and the reasons therefor. (Emphasis supplied).



As pointed out previously, former § 41(20) related only to civil actions against the United States enumerated therein. Actions under §§ 345-346 were not among those enumerated. There was no intent in the 1948 codification to effect a change in the law as to the statute of limitations; therefore, 28 U.S.C. § 2401(a) was not made applicable to actions to recover allotments under 25 U.S.C. §§ 345-345.

### C. An Intent To Diminish Special Indian Rights Must Be Clearly Expressed

Prior to 1948, Congress plainly had not placed any limitations on

actions brought pursuant to 25 U.S.C. §§ 345-346. 28 U.S.C. § 2401(a), as part of the 1948 Code Revision, is a later general statute of limitations which has no effect on the special statute authorizing actions for allotments or other Indian land, 25 U.S.C. §§ 345-346. In order to change or modify §§ 345-346, there must be some clear expression on the part of Congress to do so.

> Privileges granted to a certain class by special act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But the special act and the general law stand together, the one as the law of the particular class and the other as the general rule. (Citations omitted).

Hemmer v. United States, 204 F. 898, 906 (8th Cir. 1912), aff'd, 241 U.S. 379 (1916).



Where special Indian rights are involved, this rule of construction is particularly applicable. Squire v. Capoeman, 351 U.S. 1 (1956); Morton v. Mancari, 417 U.S. 535 (1974). In Squire, the Supreme Court refused to hold that the special protection afforded Indian allotments found in the patents, was affected by the broad language of the Internal Revenue Act so as to make income derived from the restricted land taxable. And in Mancari, the Court held that the general Equal Employment Opportunity Act of 1972 did not repeal Indian preference found in other acts of Congress.

Under the same rules of construction as applied in Mancari, Squire and Hemmer, the general statute of limitations for civil actions

against the United States cannot be interpreted to apply to the special Indian statute, 25 U.S.C. §§ 345-346 authorizing actions against the United States involving the right to an allotment or other parcel of land, in the absence of a clear expression of intent by Congress. Ordinary rules of statutory construction fully support this result; special rules applicable to construction of Indian statutes compel the result:

> . . . we must be guided by that "eminently sound and vital canon," Northern Cheyenne v. Hollowbreast, 425 U.S. 649, 655 n 7, 48 L.E. 2d 274, 96 S.Ct. 1793 (1976), that "statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians. Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89, 63 L.Ed. 138, 39



> S.Ct. 40 (1918). See Choate v. Trapp, 224 U.S. 665, 675, 56 L.Ed. 941, 32 S.Ct. 565 (1912); Antoine v. Washington, 420 U.S. 194, 199-200, 43 L.Ed. 2d 129, 95 S.Ct. 944 (1975).

Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

Finally, the great attention given to making 28 U.S.C. § 2415 applicable to causes of actions by Indians against third parties demonstrates the unlikelihood that 28 U.S.C. § 2401(a) would have been made applicable to claims under 25 U.S.C. §§ 345-346 with not a word to that effect in the legislative history.

### D. The Consistent Administrative Interpretation of 28 U.S.C. § 2401(a) Has Been That The Statute Is Not Applicable To Actions Brought Pursuant To 25 U.S.C. §§ 345-346

Until relatively recently, the United States had not interpreted any

statute of limitations as applicable to actions under 25 U.S.C. §§ 345-346. See Loring v. United States, 610 F.2d 649 (9th Cir. 1979) (first Court of Appeals decision of which we are aware). Previously, actions had often been brought without regard to the statute. See Sampson v. United States, 533 F.2d 499 (9th Cir. 1976); Fontenelle v. Omaha Tribe of Indians, 298 F. Supp. 855 (D. Neb. 1969), aff'd, 430 F.2d 143 (8th Cir. 1970). Even after Loring cases have been brought without regard to any statute of limitations. Antoine v. United States, 637 F.2d 1177 (8th Cir. 1981).

Moreover, we know of no cases in which the former statute, 28 U.S.C. § 41(20), was invoked as a defense by the United States in actions filed



prior to 1948. See e.g., Gerard v. United States, 167 F.2d 951 (9th Cir. 1948); Arenas v. United States, 322 U.S. 419 (1944).[14/]

## CONCLUSION

This Court should affirm the decision of the Eighth Circuit Court of Appeals. In the alternative, if the Court should rule that one of the defenses raised by the United States is applicable, it should limit its opinion to the specific situation

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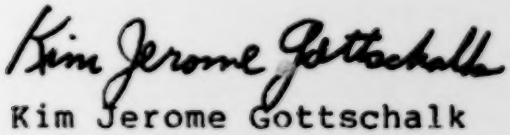
14/The policy of the federal government both before and after 1948 has consistently reflected an intent to protect Indian lands by bringing suit on behalf of the individual Indian in cases such as this despite the number of years between the initial wrong and the filing of the suit. See, e.g., United States v. Hemmer, 241 U.S. 379 (1916); United States v. Joyce, 240 F. 610 (8th Cir. 1917); United States v. State of Washington, 233 F.2d 811 (9th Cir. 1956); United States v. Krause, 92 F. Supp. 756 (D.La. 1950).

where the United States possesses the land and should leave open their question of the applicability of any defense where the United States is joined under 25 U.S.C. §§ 345-346 because of its complicity. See Covelo Indian Community v. Watt 551 F. Supp. 366, 382 (D.D.C. 1982).

Respectfully submitted,



Kim Jerome Gottschalk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760